Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-1381

ROBERT GEORGE DRUMMOND and MILDRED PAULINE DRUMMOND,

Petitioners,

versus

FULTON COUNTY DEPARTMENT OF FAMILY & CHILDREN'S SERVICES, VALLIE STATON, Director, and KAY DALLINGER, Supervisor; DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF GEORGIA, JIM PARHAM, Director, JACK WATSON, Chairman of the Board,

and TIMOTHY LEE HILL,

Respondents.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[563 F.2d 1200]

Robert George DRUMMOND and
Mildred Pauline Drummond
Plaintiffs-Appellants,

v.

FULTON COUNTY DEPARTMENT OF FAMILY
& CHILDREN'S SERVICES, et al.,
Defendants-Appellees.

No. 76-1888.

United States Court of Appeals
Fifth Circuit

Nov. 28, 1977.

* * *

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, and TUTTLE, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

RONEY, Circuit Judge:

Plaintiffs, Robert and Mildred Drummond, a white couple, acted as state-designated foster parents of a mixed race child for over two years. When the defendant state adoption agency decided to remove the child for permanent placement in

another home, plaintiffs commenced this action under 42 U.S.C.A. §1983. Alleging denial of their rights under both the equal protection and the due process clauses of the Fourteenth Amendment, they sought preliminary and permanent injunctive relief, which was denied by the district court. Although a panel of this Court reversed, Drummond v. Fulton County Department of Family & Children's Services, 547 F.2d 835 (5th Cir. 1977), the full Court finds no deprivation of constitutional rights and affirms the dismissal of plaintiffs' complaint.

Initially, the en banc Court adopts the discussion, reasoning and result contained in the dissenting opinion to the panel decision in this matter as the correct statement of the law in this case. That opinion is reported in 547 F.2d at 847-861. We further address the issues here, however, in view of the oral argument before the full Court, a subsequent case decided by the United States Supreme Court, and supplemental briefs filed with this Court.

The factual background of this dispute is set out in full in Judge Tuttle's thorough opinion for the panel which considered this case. 547 F.2d 835-857. A brief recapitulation will suffice to place the following discussion in context.

In December 1973 in an emergency situation, a one-month-old mixed race child named Timmy was placed for temporary care in the home of Mr. and Mrs. Drummond by the Fulton County children's service agency. Lengthy proceedings were commenced to determine whether the child should be permanently removed from his natural mother's custody and placed for adoption.

Within a year, the Drummonds had become sufficiently attached to Timmy to request permission to adopt him. The Drummonds had not signed an agreement that they would not try to adopt their foster child, as is common practice with many placement agencies. Although the level of care provided by them as foster parents had consistently been rated excellent, there was an emerging consensus within the defendant child placement agency charged with Timmy's care that it would be best to look elsewhere for a permanent adoptive home. When this was explained

to the Drummonds in March 1975 they appeared to acquiesce. By August of that year, however, they had renewed their request to adopt Timmy.

The child was not legally freed for adoption by the Georgia courts until September 1975. Because this signaled the end of any attempt to return Timmy to his natural mother, the agency began a more focused consideration of what ultimate placement would be best for Timmy. After a number of discussions with the Drummonds, a final decision-making meeting was held in November 1975 with 19 agency employees present. Although the Drummonds were not present at this meeting, caseworkers who had dealt with them during the past two years did attend. As a result of that meeting a final agency decision was made to remove Timmy from the Drummond home and to deny the Drummonds' adoption application. It is clear that the race of the Drummonds and of Timmy and the racial attitudes of the parties were given substantial weight in coming to this conclusion. The agency employees were also aware that as Timmy grew older he would retain the characteristics

of his black father. A few months later the plaintiffs filed suit.

A hearing on the request for a preliminary injunction was scheduled for January 23, 1976, nine days after the suit was begun. During that period some discovery was conducted by the parties. At the beginning of the hearing, the trial court consolidated the hearing on the preliminary injunction with a trial on the merits, pursuant to its discretionary powers under Fed.R.Civ.P. 65(a)(2).

Although cited as error on appeal, the consolidation represented a responsible exercise of judicial discretion in view of the essentially legal nature of the contest and the need for prompt action on this case. See generally 7 Moore's Federal Practice ¶65.04[4] (2d ed. 1975).

After hearing six witnesses and arguments of counsel the court, by verbal order, dismissed the complaint on the merits. In rendering that decision, the court made the following finding:

> It is obvious that race did enter into the decision of the Department ... [I]t appears to the Court ... that the consideration of race was properly directed to the best

> interest of the child and was not an automatic-type of thing or of placement, that is, that all blacks go to black families, al whites go to white families, and all mixed children go to black families, which would be prohibited.

On appeal counsel was appointed to represent Timmy's separate interest in this litigation.

The case as now presented to the en banc Court formulates four major issues for resolution: (1) did the action of the defendant constitute a denial of equal protection; (2) do the Drummonds have a protected liberty or property right in their relationship with Timmy; (3) does Timmy have such a right; and (4) if such rights exist, how much procedural protection is required in order to safeguard them?

I.

The Drummonds and counsel for Timmy contend that the state denied them equal protection of the laws because of the extent to which race was considered in making the adoption decision. Although the complaint alleged that race was the sole determining factor, the district court found

that this was not the case, and the finding was not clearly erroneous. The argument has thus centered on the question of whether a state agency, charged with the responsibility of placing for adoption a child in its custody, may take into consideration the race of the child and the race of the prospective adoptive parents without violating the equal protection clause of the United States Constitution.

The manner in which race was considered in this case frames the precise issue before us. The district court found that race was not used in an automatic fashion. The Drummonds' application was not automatically rejected on racial grounds. This finding may not be disturbed here because not clearly erroneous. Fed.R.Civ.P. 52(a); United States v. United States Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948). But can race be taken into account, perhaps decisively if it is the factor which tips the balance between two potential families, where it is not used automatically? We conclude, as did another court which grappled with the problem, that "the difficulties inherent in interracial adoption" justify the consideration of "race as a

relevant factor in adoption, ..." Compos v. McKeithen, 341 F.Supp. 264, 266 (E.D.La. 1972)(three-judge court).

In this regard, the Supreme Court has recently provided some guidance. It appears that even if government activity has a racially disproportionate impact, the impact alone does not sustain a claim of racial discrimination. "Proof of racially discriminatory intent or purpose is required to show a violation ...." Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed. 2d 450 (1977). There has been no suggestion before this Court that the defendants had any purposes other than to act in the best interest of the child when it considered race. Furthermore, the Supreme Court has recently stated in the sensitive area of voting apportionment that the consideration of race is not impermissible. United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). As the plurality opinion in that case remarks, where race is considered in a nondiscriminatory fashion and there is "no racial slur or stigma with

respect to whites or any other race," there is no discrimination violative of the Fourteenth Amendment. 430 U.S. at 165, 97 S.Ct. at 1009.

In concluding that there has been no denial of equal protection in these circumstances, we note the following factors.

First, consideration of race in the child placement process suggest no racial slur or stigma in connection with any race. It is a natural thing for children to be raised by parents of their same ethnic background.

Second, no case has been cited to the Court suggesting that it is impermissible to consider race in adoption placement. The only cases which have addressed this problem indicate that, while the automatic use of race is barred, the use of race as one of the factors in making the ultimate decision is legitimate. In re Adoption of a Minor, 97 U.S. App. D.C. 99, 101, 228 F.2d 446, 448 (1955); Compos v. McKeithen, 341 F.Supp. 264, 266 (E.D. La. 1972).

Third, the professional literature on the subject of transracial child placement stresses the importance of considering the

racial attitudes of potential parents. The constitutional strictures against racial discrimination are not mandates to ignore the accumulated experience of unbiased professionals. A couple has no right to adopt a child it is not equipped to rear, and according to the professional literature race bears directly on that inquiry. From the child's perspective, the consideration of race is simply another facet of finding him the best possible home. Rather than eliminating certain categories of homes from consideration it avoids the potentially tragic possibility of placing a child in a home with parents who will not be able to cope with the child's problems.

Fourth, in the analogous inquiry over the permissibility of considering the religion of would-be adoptive parents, numerous courts have found no constitutional infirmity. See generally, Annot. Religion as a Factor in Adoption, 48 A.L.R.3d 383 (1973). Those cases make the same distinction as this Court makes in the racial context. So long as religion is not an automatic factor, its consideration as one of a number of factors is unobjectionable.

Finally, adoption agencies quite frequently try to place a child where he can most easily become a normal family member. The duplication of his natural biological environment is a part of that program. Such factors as age, hair color, eye color and facial features of parents and child are considered in reaching a decision. This flows from the belief that a child and adoptive parents can best adjust to a normal family relationship if the child is placed with adoptive parents who could have actually parented him. To permit consideration of physical characteristics necessarily carries with it permission to consider racial characteristics. This Court does not have the professional expertise to assess the wisdom of that type of inquiry, but it is our province to conclude, as we do today, that the use of race as one of those factors is not unconstitutional.

II.

In order to make out a claim of deprivation of Fourteenth Amendment due process rights a plaintiff must demonstrate first, that he had been deprived of liberty or property in the constitutional sense, and

second, that the procedure used to deprive him of that interest was constitutionally deficient. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

A.

The Drummonds assert two possible constitutional liberty and property interests. The first involves a concept which plaintiffs have denominated the "psychological family"; the second, a stigma to their reputation alleged to accrue upon the rejection by the agency of their application to adopt Timmy.

Plaintiffs maintain that during the period Timmy lived with them mutual feelings of love and dependence developed which are analogous to those found in most biological families. By so characterizing their home situation they seek to come within the protection which courts have afforded to the family unit. They assert that their relationship to Timmy is part of the familial right to privacy which is a protected interest under the Fourteenth Amendment. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). As the "psychological

parents" of Timmy, they claim entitlement to the parental rights referred to in numerous decisions. See, e.g. Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

The argument that foster parents possess such a protected interest was placed squarely before, and discussed by, the Supreme Court in its recent decision in Smith v. Organization of Foster Families for Equality & Reform, ___ U.S. ___, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977)[hereinafter OFFER]. Although the Supreme Court did not find it necessary to resolve whether such an interest exists, Justice Brennan's discussion of that claim is helpful to our analysis. He first considered the elements which have traditionally been thought to define the concept of "family." Of course, the Court recognized that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of

daily association." Nonetheless, the Court then noted several differences between foster and natural families, particularly the fact that the foster parent relationship has its genesis in state law, unlike the biological relationship, and that with foster parents there is often a natural parent seeking to assert a competing liberty interest.

We conclude that there is no such constitutionally protected interest in the context of this case. An understanding of the role of the foster parent in a child placement helps make this conclusion plain. In the search for adoptive parents, thorough investigations are made so that long range considerations may be given substantial weight. Ga.Code Ann. §§ 74-409, 74-410 (Supp. 1976). Potential adoptive parents are evaluated forward in the full family context through a child's adulthood, marriage, offspring, and backward to the "adoptive" grandparents, uncles, aunts, and cousins. The attitudes of other family members are examined. In short, the goal is to duplicate the relationship that most persons have with their natural parents during their entire lives.

The Georgia Department of Human Resources has promulgated an Adoption Services Manual which sets forth the philosophy it uses in finding adoptive parents. The manual states:

> Adoption services are focused on meeting the needs of children by securing for them permanent families. Some children who need parents are infants; many are older children; some have physical, intellectual and emotional handicaps; some are children of minority groups; others are children of mixed heritage. A permanent home or plan is the right of every child. Inherent in the process of finding parents for children is the recognition that children have certain basic needs. The philosophy of the Division is to seek for children who need adoptive homes parents who are emotionally and physically capable of assuming the responsibility of parenthood and who are flexible enough to accept them for their intrinsic worth.

During this process in Georgia, children are placed in foster homes as an alternative to institutional care for what is clearly designed as a transitional phase in the child's life. Ga.Code Ann. §24A-1403 (1976). Foster parents are thus considered only on the basis of the quality

of temporary care they can be expected to provide. Therefore, in the eyes of the state, which creates the foster relationship, the relationship is considered temporary at the outset and gives rise to no state created rights in the foster parents. Drummond v. Fulton County Department of Family & Children Services, 237 Ga. 449, 228 S.E.2d 839 (1976). As Justice Stewart remarked in his concurring opinion in OFFER, "any case where the foster parents had assumed the emotional role of the child's natural parents would represent not a triumph of the system, to be constitutionally safeguarded from state intrusion, but a failure." ___ U.S. at ___, 97 S.Ct. at 2119.

Here, the only time potential parents could assert a liberty interest as psychological parents would be when they had developed precisely the relationship which state law warns against [in] the foster context. As Justice Stewart goes on to say in OFFER, it is hard to "believe that such breakdowns of the ... system must be protected or forever frozen in their existence by the Due Process Clause of the Fourteenth Amendment."

___ U.S. at ___, 97 S.Ct. at 2119. There is no basis in the Georgia law, which creates the foster relationship, for a justifiable expectation that the relationship will be left undisturbed. Cf. Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). True liberty rights do not flow from state laws, which can be repealed by action of the legislature. Unlike property rights they have a more stable source in our notions of intrinsic human rights. The very fact that the relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adoptive family by any court, demonstrates that it is not a protected liberty interest, but an interest limited by the very laws which create it. See Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976).

It needs noting that this conclusion does not necessarily control every "foster family" situation, but only those in which a child placement agency charged with the custody of a child, places that child for temporary care. Other situations will have to be addressed on a case by case basis.

The plaintiffs assert a second liberty interest in an attempt to bring themselves within the ambit of recently decided due process cases. They claim that the decision to deny them the right to adopt Timmy and to remove him from their home casts a stigma upon their reputation. They assert they satisfy all requirements which have been judicially imposed to make out a constitutional claim for harm to reputation.

In order to implicate such an interest, plaintiffs must demonstrate first that they have been denied a right previously recognized by the state in conjunction with a defamatory finding about them. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Second, they must challenge this finding as factually inaccurate. Codd v. Velger, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977). Finally, there must be publication of the defamation outside the context of litigation. Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). Although the plaintiffs have tried to satisfy each of these tests, they have not shown any liberty interest in "reputation-plus" which requires procedural due process.

First, the findings about the plaintiffs are not those which can be considered defamatory. In Paul the plaintiff was accused of being a shoplifter, in Codd of attempting suicide, and in Bishop of insubordination and "conduct unsuited to an officer." These are all allegations which might have had collateral effects when those plaintiffs sought employment, and are allegations which, if false, might have given rise to state law defamation actions. Here, the sole finding about the Drummonds is that in the judgment of the agency, they are not the best available parents for Timmy, at least in part for a reason beyond their control, i.e., their race. Their treatment of Timmy as foster parents was spoken of in glowing terms. It would thus seem there has been no defamation at all.

Second, although the Drummonds challenge the ultimate conclusion that they would not be the most suitable adoptive parents for Timmy, they have not alleged any particular factual errors in the agency's information or findings. They are in fact white, and the agency had an accurate picture of their age, health, education and other relevant data. Absent some indication

that they would be able to "clear their names" at a hearing, they are not invoking a protected interest. Codd, supra.

Finally, the information upon which the agency acted was never made public until this litigation. It is normal for foster children to eventually be removed from foster homes. Nothing publicly occurred which would cast any aspersion upon the Drummonds. Nor could the agency action in any way affect the Drummonds' attempt to adopt other children in the future.

Thus we conclude that the Drummonds have no protectable liberty interest in this case.

B.

Independent counsel for Timmy claims a liberty right personal to Timmy which he asserts must be dealt with in constitutional due process terms. The interest upon which he bases this claim is one which he has chosen to call the "right to a stable environment." He argues that a child has a liberty right not to be moved from home to home, without a prior hearing, particularly in light of the significant literature which indicates a traumatic effect of such moves on young children. Counsel insists

this right exists regardless of whether the child is in a natural, adoptive or foster setting and in all other temporary care situations.

Due to the novelty of this contention, counsel cites no authority in support of such stability interest. He relies on cases such as In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), and McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971), for the proposition that a juvenile's "status" cannot be changed without procedural due process. In those cases, however, a protected liberty interest was clearly at stake, since the juveniles involved were facing deliquency charges which could have resulted in incarceration. The liberty interest was thus not an interest in a "stable environment," or in not being moved around, but in staying out of jail.

Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), seems to speak against such an interest as asserted here. There, a state prisoner was transferred from a medium security to a maximum security facility because he was suspected of

having started a fire in the first prison. He filed a suit contending that a hearing was required before the transfer. The Court, unable to discern the protected interest involved, denied relief. Notwithstanding the fact that the transfer was motivated by specific misconduct on the part of the prisoner, and had a clearly punitive purpose and effect, the Court found no liberty interest. Other recent cases have led one author to the analysis that the Supreme Court "has grown increasingly uncomfortable with the concept of open ended and vaguely defined due process interests. It appears to prefer an analysis that is both more concrete as well as more restricted in its application." The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 102 (1976). There certainly is no concrete or well-defined interest shown by the facts of this case.

Here, the state's motive in interrupting Timmy's environment at any point was always to move him to a place which it considered superior, over the long range, for his particular needs at the time. Since Timmy can point to no source for a right in conflict with that state program, we hold

that Timmy has no liberty interest as asserted here. This decision by its facts is necessarily applicable only to an infant of tender years placed in a foster home for the length of time and under the circumstances here involved. We cannot by decision here address every conceivable situation, in some of which a child may have acquired some interest, as alluded to in Justice Brennan's opinion in OFFER.

III.

In OFFER the Supreme Court assumed arguendo the existence of a protected liberty interest, and then proceeded to test the New York child placement scheme against the strictures of due process. It was able to do this because the extensive procedural safeguards incorporated into the New York scheme were ultimately found sufficient protection for a liberty interest of any magnitude. The holding of OFFER, therefore, is that whatever the strength of the protected interest, New York provided adequate safeguards.

This Court is unable to follow that approach in this case. It cannot be gainsaid that the Georgia mechanism for removing a child from a foster home is much more informal and much less "judicial" than the

New York model. Of course, OFFER does not mandate the New York model as constitutionally necessary in every case. Nonetheless we face a scheme which is admittedly less rigorous in its procedural trappings. Thus, we have been required to face head on and resolve the question which was the subject of the Supreme Court's assumption. In doing so we have concluded that there is no liberty interest here of full-fledged constitutional magnitude.

OFFER itself, however, by pretermitting the question of the existence of a protected interest, leaves open the possibility that some such an interest might exist. Although no liberty interest of substantial magnitude is present in the instant situation, some might find a lesser interest in these facts deserving of some protection against arbitrary conduct. We thus consider whether the procedures afforded in Georgia were adequate to protect whatever interest might be at stake. The nature of the Georgia procedures is set out in detail in the panel opinions reported in 547 F.2d 835. Of course, "[t]he required degree of procedural safeguards varies directly with the importance of the private interest affected

and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it." Friendly, Some Kind of Hearing, 123 U.Pa. L.Rev. 1267, 1278 (1975). See also Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. (59 U.S.) 272, 280, 15 L.Ed. 372 (1855). The Fourteenth Amendment is not so inflexible as to require a trial-type hearing for every interest felt worthy of protection. Nor is the Georgia scheme to be measured against New York's, since OFFER in no sense elevates the New York scheme into a constitutional standard.

IV.

To the extent there may be some undefined interest in this case that could not be treated by the state arbitrarily, we note that the process afforded by defendants was sufficient to comport with the Fourteenth Amendment mandate in connection with such interest.

It has been frequently stressed that the requirements of due process are flexible and vary with time and circumstances. Morrissey v. Brewer, 408 U.S. 471, 481, 92

S.Ct. 2593, 33 L.Ed.2d 484 (1972); Cafeteria Workers v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). Quite recently, the Supreme Court articulated the test to be used in determining what process is due in any particular circumstance. That test requires consideration of (1) the private interest at stake; (2) the risk of erroneous decisions under the present procedure and the improvement in decision making which would flow from additional procedural safeguards; and (3) the governmental interest involved. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Applying this test to the case at bar reveals that the procedures currently in use strike a constitutionally adequate compromise. The private interest here is presumably the privacy, reputation, and stability concerns discussed above, the interest flowing from the love, affection and concern developed between the Drummonds and Timmy.

The agency decision in this case to be made under any procedural format, as all concede, is "what placement is in the best interest of the child?" The subsidiary

inquiries which must be addressed in deciding this question are complex and numerous. The present procedure is designed to maximize information in answering these questions. Several interviews were had with the foster parents. The child was observed and tested mentally and medically. Data was collected about the child's natural mother and father. Persons trained in various skills, including psychology and social work are involved in the process. Informality was used to elicit spontaneous and accurate responses to sensitive inquiries. In sum, the present system seems designed to obtain the most accurate answer possible to the ultimate difficult question and the risk of error is minimized. There has been no indication that additional or more accurate information could be produced at a more structured trial-type hearing that would lead to a superior decision about Timmy's placement. The reason is obvious. In most hearing situations, the question to be resolved is one of fact. Here, however, the ultimate question is essentially one of policy. Child placing is an art, not a science that can be computerized to follow rigid rules.

The "best" home for Timmy is basically a subjective determination. Should intellectual opportunity be stressed over financial or athletic opportunity? Is a rural setting preferable to the city? What age should his adoptive parents be? In what order of the social structure? Should a given child be placed with older siblings, younger siblings or no siblings? The questions could go on for pages. These questions are policy inquiries, not factual disputes. The utility of a hearing in such a situation is doubtful. As one commentator has noted,

> [t]rials are at their best when specific adjudicative facts are in dispute. Trials are seldom desirable either on legislative facts or on broad factual issues. That a plaintiff has a protected interest at stake does not mean that he is entitled to a trial, because an issue appropriate for trial may be absent.

K. Davis, Administrative Law of the Seventies §7.00-11 at 276 (1976).

Finally, we consider the Government's interest. The Government desires, of course, to act consistently with the child's best interest. Its additional concern, however, is to move as efficiently as possible.

Children in foster care are a state expense, while those in adoptive homes are generally not. Sometimes extreme haste is necessary in an emergency to place a child in foster care. The quicker a child can be placed in a permanent home, the better. The presence of additional procedural safeguards and appeals procedures would naturally slow the placement process down to the detriment of both child and state.

Given the nature of the interests at stake, and the inquiry involved, as well as the overwhelming need for flexibility in this situation and the complexity of the decision to be made, this Court holds that whatever process was due was rendered by the state agency in this case.

AFFIRMED.

JOHN R. BROWN, Chief Judge, concurring:

While I agree with the views expressed by Judge Roney and concur fully in the result and opinion, I feel that some comment is warranted focusing on the practicalities and realities of the unfortunate situation which confronts us.

Assuming the Drummonds have any protectible liberty interest which triggers

the due process clause of the Fourteenth Amendment, I believe the record in this case amply demonstrates that, whatever due process rights the Drummonds had, those rights were more than adequately safeguarded.

First, the record shows that those charged with the awesome responsibility of Timmy's best interest were concerned, sensitive and sincere professionals.[1] Second, there can be no doubt that the Drummonds had notice, at least by March 17, 1975, that placement outside their home was a very real possibility. Third, the Drummonds were heard. The record establishes that the Drummonds personally met with various case workers on at least three occasions: March 10, August 25, and October 4, 1975.[2] Fourth, the notes of the

1. For example, the notes of the November 21, 1975, "staffing" at which the final decision was made to place Timmy elsewhere, state in pertinent part: "The discussion lasted approximately three hours and the group consensus not to allow the Drummonds to adopt Timmy was carefully thought out and personally painful for all those present." Plaintiff's Exhibit 15, p. 1; emphasis added.

2. See 547 F.2d at 838-46.

October 4 "evaluation interview" conducted by Brenda B. Payne,[3] Plaintiff's Exhibit 14, recommending that the Drummonds be allowed to adopt Timmy, were given to each person present at the November 21 staffing and Mrs. Payne read those notes aloud as her "recommendation." Payne Deposition at 30. Thus, it cannot be said that the Drummonds' interests were not represented at that meeting. While no formal adjudicatory hearing was held, what, as a practical matter, could have been accomplished by such a hearing in view of what had happened before the staffing? My answer to this question is "Nothing."

As to the equal protection contention, it is abundantly clear to me that no violation occurred. The notes of Ms. Payne's "evaluation interview" alone should be dispositive on this score. Factors other than race were indisputably taken into account: The Drummonds' tendency to be overprotective, their intellectual capacities, and their age. Moreover, the "[m]ain topics of discussion" at the November 21 staffing

3. Quoted in full at 547 F.2d at 843-46.

(see Plaintiff's Exhibit 15) numbered seven: age, health, community setting, involvement of extended family, parenting abilities, intellectual environment, and race.

As to the last of these topics, not only do I agree with Judge Roney's conclusion that race may be considered as "a" factor in adoptions without violating the equal protection clause, but I would state that as a practical matter, it should be so considered. Indeed, adoption personnel would be blinking at reality if they failed to consider the race of the adoptive parents vis-a-vis the child. I would also go so far as to state that they could give substantial weight to race as a factor -- including consideration of such things as the geographical location and area attitudes involved -- without treading dangerously on equal protection rights. Indeed, agency personnel, without violating the Fourteenth Amendment, could expressly declare that the racial difference between the child and the "adoptive" parents was the primary reason for making the child placement decision. Granted that society and the community should not harbor attitudes against inter-

racial mixture, the subject of the foster home placement and even adoption is the child, whose life will be affected by community values and prejudices as they exist, not what they ought to be.

Lastly, it would be unwise, and to my mind, an arrogation of power for Federal Judges to voyage into the supersensitive realm of state adoption matters. To set standards as the dissent would require sounds easy. But inevitably that process involves policy choices which to go the heart of the welfare of the child, probably for the rest of the child's life. On what do we draw in making these choices? Are we, as Federal Judges, endowed with sufficient prescience to decide such delicate issues? We should remind ourselves that we do not possess the wisdom of Solomon and that Timmy's adoption is not as blissfully simple as cutting the baby in half.

GODBOLD, Circuit Judge, concurring in part.

In concur with parts I, II and III of the opinion of the en banc court. I believe that if there was a protectible interest at stake the procedures followed by the State of Georgia were not constitutionally adequate, therefore I am not able to join in

part IV of the opinion.

TUTTLE, Circuit Judge, with whom GOLDBERG, Circuit Judge, joins, dissenting:

With deference, I dissent. Believing as I do that the Supreme Court opinion in Smith v. Organization of Foster Families for Equality and Reform, ___ U.S. ___, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977), strongly supports the conclusion expressed in the panel opinion of this Court that both the Drummonds and Timmy have a "liberty" right in their foster family relationship which cannot be destroyed by the state without a due process hearing, I consider it necessary to dissent from the Court's opinion.

I. THE "LIBERTY" INTEREST OF THE DRUMMONDS

The OFFER case arose from a contest between the natural mother of a child and foster parents who had had continuous custody of the child for a considerable period of time. The New York statute specifically addressed the problem that was presented when such a contest arose. As described in the Court's opinion in OFFER:

> "Soc.Serv.L. § 383(2), supra, n. 3, provides that the 'authorized agency placing out or boarding [a foster] child ... may in its discretion remove

> such child from the home where placed or boarded.' Administrative regulations implement this provision. The agency is required, except in emergency, to notify the foster parents in writing 10 days in advance of any removal. 18 N.Y.C.R.R. § 450.10(a). The notice advises the foster parents that if they object to the child's removal they may request a 'conference' with the social services department. Ibid. The department schedules requested conferences within 10 days of the receipt of the request. 18 N.Y.C.R.R. § 450.10(b). The foster parent may appear with counsel at the conference, where he will 'be advised of the reasons [for the removal of the child], and be afforded an opportunity to submit reasons why the child should not be removed.' 18 N.Y.C.R.R. §450.10(a). The official must render a decision in writing within five days after the close of the conference, and send notice of his decision to the foster parents and the agency. 18 N.Y.C.R.R. § 450.10(c). The proposed removal is stayed pending the outcome of the conference. 18 N.Y.C.R.R. § 450.10(d).
>
> If the child is removed after the conference, the foster parent may appeal to the department of social services for a 'fair hearing," that is a full adversary administrative hearing, under Soc.Serv.L. § 400, the determination of which is subject to judicial review under N.Y.C.P.L.R. Art. 78; however, the removal

is not automatically stayed pending the hearing and judicial review. (Footnotes omitted)."

Ibid, __ U.S. __, 97 S.Ct. 2102-03.

Furthermore, the Supreme Court opinion referred to an additional "pre-removal procedural safeguard." The Court said:

> "In other words, § 392 provides a mechanism whereby a foster parent may obtain pre-removal judicial review of an agency's decision to remove a child who has been in foster care for 18 months or more."

Ibid,[1] __ U.S. __, 97 S.Ct. 2104.

Notwithstanding these provisions of the New York law, the three-judge district court enjoined a removal in the OFFER case without additional procedural safeguards, the court having found those provided by statute were insufficient.

The Supreme Court reversed the judgment of the three-judge court, not by saying that the foster parents did not have a protectable interest under the Constitutional, but because it found "that 'narrower grounds exist to support' our reversal." The Court stated:

> "We are persuaded that, even on the assumption that appellees

1. At the time of removal here, Timmy was over two years old.

> have a protected 'liberty interest' the district court erred in holding that the pre-removal procedures presently employed by the state are constitutionally defective."

Ibid. __ U.S. __, 97 S.Ct. 2111.

In view of the fact that the State of Georgia has no "preremoval procedures" that will fit any concept of due process, a subject that will be discussed later, the case before us demands that a determination be made whether there is such protectable interest in the Drummonds.

As is sometimes the case, I believe that the concurring opinion, joined in by the Chief Justice and two of the Justices, dramatically emphasizes the importance which a majority of the court attributed to the question whether a liberty interest inheres in the relationship between the foster parents and children who have been in their care a substantial period of time. It would have been very simple for the court to have taken the position adopted by the concurring Justices as expressed by Mr. Justice Stewart:

> "I cannot understand why the Court thinks itself obliged to decide these cases on the assumption that either foster parents

> or foster children in New York have some sort of 'liberty' interest in the continuation of their relationship (footnote omitted). Rather than tiptoeing around this central issue, I would squarely hold that the interests asserted by the appellees are not of a kind that the due process clause of the Fourteenth Amendment protects."

Ibid. __ U.S. __, 97 S.Ct. 2116-17.

However, rather than follow this course, the Court took considerable pains to analyze the assertion of the foster parents and foster children that they had a constitutionally protected liberty interest. A careful reading of the opinion indicates to me that but for the existence of the narrower ground in that case and but for the fact that the contest before the court was being waged between foster parents on the one hand and natural parents on the other, the court would readily have determined that such constitutionally protected liberty interest did exist. In the first place, the court recognized that, although "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element" and that "a biological relationship is not

present in the case of the usual foster family" nevertheless "biological relationships are not exclusive determination of the existence of a family." Ibid. ___ U.S. ___, 97 S.Ct. 2109-10. Most telling is the following language from the Court's opinion:

> "Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children. Wisconsin v. Yoder, 406 U.W. 205, 231-233, 92 S.Ct. 1526, 1541 -42, 32 L.Ed.2d 15 (1972), as well as from the fact of blood relationships. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. (Footnote omitted). At least where a child has been placed in foster case as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. (Footnote omitted). For this reason,

we cannot dismiss the foster family as a mere collection of unrelated individuals. Cf. Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974)." [Emphasis added.]

Ibid., __ U.S. __, 97 S.Ct. 2111.

Following this language, the Court pointed up the distinctions between the foster family and the natural family, particularly in light of the fact that the foster family is a creation of statute and the Court concluded this discussion by saying:

"In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty'." [Emphasis added.]

The Court then discussed the posture of the OFFER case as being a contest between foster parents and the natural parent of a child. The Court then said:

"It is one thing to say that individuals may acquire a liberty interest against arbitrary government interference in the family-like associations into which they are freely entered, even in the absence of biological connection or state law recognition of the relationship. It is quite another

to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right -- an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents." [Emphasis added.]

Ibid. __ U.S. __, 97 S.Ct. 2111.

Thus, I think it can confidently be stated that if the Drummonds' case were before the Supreme Court instead of the OFFER case and the state law did not provide the elaborate arrangements for a due process hearing, the foster parents would have prevailed in their claim that they had a constitutionally protected liberty interest.

II. TIMMY'S "LIBERTY" INTEREST

What has been said respecting the liberty interest of the Drummonds, of course, applies, possibly even more cogently, in the case of the small child whose entire life will be affected in large or small

degree by his being taken away from the only parents he has known since his birth. Again, I refer to the language of the Court in OFFER:

> "At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, [all of which perfectly described Timmy] it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions as a natural family. (Footnote 52 omitted."

In footnote 52, the Court, after speaking of the dispute as to the validity of a "psychological parent" theory stated:

> "But this case turns not on the disputed validity of any particular psychological theory, but on the legal consequences of the undisputed fact that the emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families." [Emphasis added.]

Ibid. __ U.S. __, 97 S.Ct. 2110.

Moreover, Timmy's case does not rest entirely on my understanding of what the Supreme Court would do if faced with the

precise issue presented by Timmy. It appears that the defendants agree that Timmy has due process rights. The State, in its brief, stated:

> "The Department recognizes the existence of children's rights -- and specifically recognizes that Timmy had due process rights involved in this juvenile system."

Further, in the appellees' petition for rehearing en banc they stated:

> "Defendants have conceded that children have due process rights. However, the scope of those rights is completely a function of the nature of the Government conduct affecting the child. Thus, where a government acts in its parens patriae capacity to protect neglected children and assumes the status of guardian, through its qualified agency personnel, the child's rights are protected if the state structures a system designed to accommodate the child's best interest."

As I read this language, it means that the defendants concede that the liberty interest exists, but that the Georgia adoptive system, taken as a whole, affords to Timmy the due process to which he is entitled and that all the process that Timmy is due at any stage of his temporary care,

his foster family relationship and their terminations, the termination of parents' rights, and final adoption is that "the state structures a system designed to accommodate the child's best interest." In other words, appellees say that as long as the legislature decides in its wisdom that everything relating to an abandoned child's welfare and status can safely be left to the uncontrolled and unreviewable discretion of state and county employees that satisfies all due process requirements. This would include the action taken here by which the defendants seek to terminate irrevocably a relationship which the Supreme Court has, in the passages quoted above, recognized as parallel to that of a biological family, without any opportunity of the child to be heard. In any event, it appears to be a concession by the state that Timmy has a protectable interest. The question whether this interest can be taken away from him by the sort of proceedings had here is discussed below.

III. WHAT PROCESS IS DUE?

The ad hoc nature of the steps that finally led to a committee decision to remove Timmy from the Drummonds' custody and to "begin immediately to look for an appropriate black adoptive home" is fully set out in the panel opinion of this Court at 547 F.2d 835 (5th Cir. 1977). As fully disclosed in that opinion, in March 1976, a "staffing" of four caseworkers or supervisors, none of whom had either seen the Drummonds or Timmy at that time, concluded ex parte that the Drummonds should be told that Timmy was to be taken from their care and "that it would be in Timmy's best interest to be adopted by a black couple." Bearing in mind that this decision was made before any of the persons involved had seen the Drummonds and before the several investigations and studies of the Drummonds as potential adoptive parents were made,[2] it is obvious, it seems to me, that Mrs. Dallinger's effort to analyze at the trial what was meant by the action taken at the staffing is an afterthought,

2. It is to be noted again here that each of the investigations resulted in fulsome praise of the Drummonds' relationship with the child.

because the only purpose for approaching the Drummonds was to explain to them that the child was to be removed and awa ded to black adoptive parents. I comment on this only because the decision on whether the procedures followed provided minimal due process must necessarily depend upon when the decision was made. Miss Osgood's statement that the question was raised "that if the Drummonds were not amenable to our plan, would we move Timmy to a black foster home feeling that, you know, it would be better if we were going to have him adopted by a black couple, to have him in a black foster home if there was going to be any length of time before he was free" clearly indicates that "our plan" was that "we were going to have him adopted by a black couple." It seems apparent that this was the decision because the undisputed testimony of Mrs. Drummond following the final "consensus" was that Mrs. Dallinger said to Mr. and Mrs. Drummond: "I am sure that you are both very anxious to know what has happened and we called you in to tell you that the decision still stands, that we feel that Timmy will be better off adopted by a black couple or a black family." [Emphasis added]. Of course, the only "decision"

that Mrs. Dallinger could have referred to is the decision made at the March staffing which I have discussed above. I suppose no one would claim that if the Drummonds and Timmy are entitled to any process at all they had received it by the time this decision was made.

However, the matter did not end after the March meeting between the caseworkers and the Drummonds. The latter protested and requested a reconsideration. They were put off by statements that no action would be taken until after Timmy's mother's rights had been terminated by the Juvenile Court. This was done in September, and in the meantime, several inquiries and studies were made by caseworkers or other officials of the defendant Department, most of which discussed the merits, pro and con, of the relationship between Timmy and his foster parents.[3] Finally, without giving the Drummonds an opportunity to be present and without their having been notified of the standards by which the relationship would be judged, a group

3. It should be noted again that most of these reports were extravagant in their praise of the manner in which the Drummonds had developed a genuine loving family with this child. See 547 F.2d 835.

meeting of 19 employees of the Department was called to obtain a "consensus" as to what should be done with Timmy in relation to his foster parents.

A written report of this meeting states in its last paragraph:

> "A vote was taken and it was a group decision that it would not be in Timmy's best interest to leave him in the Drummonds' home, and that we would begin immediately to look for an appropriate black adoptive home. Although this was a difficult decision it was felt that Timmy's long range best interest must be the focus."

The Drummonds were not present at the staffing of November 21. No physician or psychiatrist was present. There is no record of any testimony or statement made by any person present, except that we can assume that the documents heretofore referred to were available to the members of the group. The Drummonds were not given an opportunity to present any statements or evidence, much less to be represented by counsel or to present witnesses supporting their position nor were they given any notice of the basis on which the decision might rest. Of course, it is apparent from the face of the documents that no findings

of fact were made as to any of the possible grounds of challenging their qualifications as adoptive parents. It is apparent from the record that they were attempting at all times merely to resist the removal of Timmy on the only ground which was explained to them, that is that it was the plan for "this type" of child to be adopted by black parents. It follows, of course, that it is impossible to tell the basis on which the decision was made, since no findings of fact were made. The trial court did not deal with the due process claim asserted by the Drummonds. Timmy's separate claim of the right to due process was not presented, because he was separately represented in the trial court.

I, of course, agree with the conclusion in the Court's opinion that the kind of a hearing that is mandated by the due process clause varies according to the particular interests that are sought to be protected and the adverse effect a requirement of a hearing would have on the governmental

interest involved. However, one of the principal reasons why I feel it necessary to note my dissent to this opinion is the conclusion stated in the final paragraph:

> "Given the nature of the interest at stake, and the inquiry involved, as well as the overwhelming need for flexibility in this situation and the complexity of the decision to be made, this Court holds that whatever process was due was rendered by the state agency in this case."

I sincerely believe that this statement trivializes due process beyond recognition. In the Supreme Court decision, Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, the Court found that its prior decisions indicated that indentification of the specific dictates of due process "generally requires consideration of three distinct factors:

> "[F]irst, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or

> substitute procedural requirement would entail. See, e.g., Goldberg v. Kelly, supra, 397 U.S. 254, at 263-271, 90 S.Ct. 1011, 25 L.Ed.2d 287."

In that case, which was the complaint of a disabled worker that prior to the termination of Social Security disability benefit payments the recipient must be afforded an opportunity for an evidentiary hearing, the Court found that he was not entitled to such a hearing because of the elaborate procedural provisions under the statute and regulations, saying:

> "Information regarding the recipient's current condition is also obtained from his sources of medical treatment DISM, § 353.4. If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician. Ibid. Whenever the agency's tentative assessment of the beneficiary's condition differs from his own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other

evidence in his case file. He also may respond in writing and submit additional evidence. Id. § 353.6.

The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. 42 U.S.C. § 421(c); CM §§ 6701(b), (c). If, as is usually the case, the SSA accepts the agency determination it notifies the recipient in writing, informing him of the reasons for the decision, and of his right to seek de novo reconsideration by the state agency. 20 CFR §§ 404.-907, 404.909 (1975). Upon acceptance by the SSA, benefits are terminated effective two months after the month in which medical recovery is found to have occurred. 42 U.S.C. § 423(a)(1970 ed. Supp. III).

If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. 20 CFR §§ 404.917, 404.927(1975). The hearing is non-adversary, and the SSA is not represented by counsel. As to all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. §404.934. If this hearing results

in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, § 404.945, and finally may obtain judicial review. 42 U.S.C. § 405(g); 20 CFR § 404.951 (1975).

Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments. 42 U.S.C. § 404. Cf. § 423(b); 20 CFR §§ 404.501, 404.503, 404.504 (1975). If, on the other hand, a beneficiary receives any payments to which he is later determined not to be entitled, the statute authorizes the Secretary to attempt to recoup these funds in specified circumstances. 42 U.S.C. §404. (Footnotes omitted)." 424 U.S. at 338, 339, 96 S.Ct. at 904-05.

By contrast, there is no statute and there are no regulations that cover the requirements which must be complied with by the Department before a relationship such as that enjoyed by the Drummonds and Timmy is terminated. In actual practice, moreover, there was nothing to compare with the provision described in the margin that "whenever the agency's tentative assessment of the beneficiary's condition differs from his own assessment, the

beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file" nor was there anything remotely resembling the opportunity given, as described by the Supreme Court in its opinion which says "he also may respond in writing and submit additional evidence."

In the Mathews case, as the Supreme Court noted, the final determination by the agency is then "reviewed by an examiner in the SSA Bureau of Disability Insurance." 42 U.S.C. § 421(c); CM §§ 6701(b), (c)(footnote omitted). If, as is usually the case, the SSA accepts the agency determination, it notifies the recipient in writing informing him of the reasons for the decision, and of his right to seek de novo reconsideration by the state agency . ..." 424 U.S. at 338, 96 S.Ct. at 904 [Emphasis added.]

All this is then followed if the recipient seeks reconsideration, by a federal appeal and an evidentiary hearing before an administrative law judge, as pointed out

in the margin. In contrast, there is nothing in the Georgia law that permits any review, appeal or reconsideration by any tribunal or official or court of the "consensus judgment" made by this ad hoc committee.

The only kind of judicial review available is by the filing of a complaint in the United States Court where, as happened in this case, the district court had before it only an imperfect documentary record and the testimony of several of the actors in the proceeding who undertook to speak for the entire group of 19 and to explain what they had in their mind when they finally terminated Timmy's only known family relationship.

Of course, prominent in the Court's discussion in the Mathews case is the kind of harm that might result by the official action, together with the risk that such harm would occur through the procedures used, together with the probable value of additional procedural safeguards. Here, all evidence of the case indicated that agreement of all concerned that a breakup of this family unit would be a traumatic experience for the child. Furthermore,

whereas the Mathews case dealt with money which could be recouped if the decision turned out to be erroneous, what is dealt with here is the child's whole life, for the termination will undoubtedly govern Timmy's whole life, optimistically for good, but, if erroneous, for harm.

As to the governmental burdens which would result from granting of minimal due process, there is nothing in the record that indicates that any substantial number of foster parents seek to actually establish a close family relationship with an infant or child of tender years and then seek to become adoptive parents. Any requirement of due process should certainly not extend beyond those who wish to have some such procedures followed if they find themselves in the same position with respect to a foster child as are the Drummonds. The administrative procedures would thus appear not to present any formidable state burden.

Although the court in Mathews was dealing with a property interest, I think its description of the Supreme Court's prior efforts to define due process is apposite here. The Court said:

"The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951)(Frankfurther, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). See Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914)."

Whatever took place within the confines of the Department, certainly cannot be thought by anyone to have fallen within any of these definitions. Probably the worst aspect of the matter is that under the law as announced by the Court here, absolute and final discretion is allowed to the Department.

I know of no other situation under our laws in which the whole future life of a child of tender years can be gravely affected by the totally uncontrolled discretion of public officials without an opportunity for a hearing by those affected. I

join in the assumption that I am sure underlies the opinion of the Court that the persons involved intended to do what they thought to be for the best of the child in the circumstances, but the law we announce today would deny relief to persons equally affected even though a strong showing could be made that the persons acting had done so capriciously, venally, or from definite racial bias, because the opinion says that the proceedings which produced the result in Timmy's case were adequate to satisfy the requirements of due process.

IV. THE RACIAL QUESTION

The complaint alleged that the action of the defendants in removing Timmy from the custody of the Drummonds was motivated solely on racial grounds, that is it was done pursuant to a policy that black or part black children could not be placed for adoption with a white couple. One of the great defects in the proceeding here is the fact it is utterly impossible to determine whether or not this allegation is true. A careful reading of the documentary and oral testimony introduced at the trial gives me a strong belief

that the decision made by the four or five workers in March to tell the Drummonds that they must give up Timmy so that he can be raised by a black couple was the one and only basis for all of the proceedings and the result that issued therefrom. In any event, there was no record, there was no transcript of testimony, there is no indication that any word about other reasons then Timmy's race went into any decision-making or was the basis for the final decision.

The fact that this problem could not be resolved by the trial court on the record before it, as I firmly believe, adds much to my feeling of the necessity of having a much more adequate hearing procedure before such issues can be disposed of administratively.

What I have said up to this point is meant to indicate that I believe that both the Drummonds and Timmy have been denied a liberty right without due process, entirely without respect to the question of race. I simply add that when the question of whether the Department of Family and Children's Services has a policy that, if available, only black parents may adopt black or

mixed-race children is still unresolved because of the deficiency in the proceedings then the facts cry out for a different kind of hearing before the administrative body. This is necessary in order that there can be a proper review, if not administratively within the state, then in the federal court where such issues are cognizable.

I would adhere to the mandate issued following the panel opinion of this Court.

[547 F.2d 835 (1977)]

Robert George DRUMMOND and
Mildred Pauline Drummond
Plaintiffs-Appellants,

v.

FULTON COUNTY DEPARTMENT OF FAMILY &
CHILDREN'S SERVICES, et al,
Defendants-Appellees.

No. 76-1888

United States Court of Appeals
Fifth Circuit

Feb. 2, 1977.

Dissenting Opinion Feb. 11, 1977.

Rehearing En Banc Granted

March 28, 1977.

* * *

TUTTLE, Circuit Judge:

This appeal presents the question whether the federal courts can give relief to white foster parents who contend that they have been unconstitutionally denied by Georgia state officials the right to adopt a mixed race child solely on account of race. Neither the trial court nor this Court has the desire nor the authority to second-guess the Department of Family and Children Services on the fitness or suitability of anyone as adoptive parents. Our jurisdiction permits us only to ascertain whether in the adoption process the state has deprived the plaintiffs of a protectable interest under the Fourteenth Amendment without procedural due process or

or has denied them equal protection of the laws as guaranteed by the Fourteenth Amendment.

I. FACTUAL OUTLINE

The record before us, while very sketchy because of the fact that the trial court plainly considered it to be to the best interests of all concerned to keep the hearing on preliminary and permanent injunction narrowly restricted,[1] nevertheless discloses the following facts:

The child, Timothy, known throughout as Timmy, was born out of wedlock on November 17, 1973 to a white mother by a black father. After one month in the care of his natural mother, he was taken into the care of the defendant Fulton County Department of Family and Children Services under the authority of Georgia law because of the "unfitness" of the mother. On December 15, when he was less than one month old, he was placed in the home of

1. The hearing, by order dated January 14, 1976, was set down for January 23 on a motion for preliminary injunction. Following abbreviated discovery by interrogatories and depositions, the trial court on June [sic, January] 23, when the hearing commenced, stated that the case would be considered on the merits. Both parties stated that they had insufficient time, but they may have waived any objection to the order of consolidation. On appeal the appellants, plaintiffs below, claim that they are entitled to a reversal of the order of dismissal on the merits because of inadequate notice and time for preparation for a consolidation under Rule 65(A)(2) F.R.C.P. In light of the disposition we make of the case, we need not reach this contention.

Robert and Mildred Drummond, the plaintiffs, as foster parents. At this time, Mrs. Drummond was 49 or 50 years old and her husband was 37 or 38 (the record does not show their birthdates but at the time of the action by the defendants here complained of, they were 51 and 39 respectively.

For 15 months, until March 10, 1975, the Drummonds cared for Timmy in their home as a child of their own in a manner subsequently described by the caseworkers and supervisors, both foster home and adoption personnel, as "excellent," "loving," "extremely competent" so that at that time he was described by such personnel as "an extremely bright, highly verbal, outgoing 15-month-old baby boy."

Home visits by foster home caseworkers were infrequent, but some contact was maintained by telephone, especially when the Drummonds desired to leave town for trips. Some time late in 1974, it came to the attention of the then current caseworker Barbara Osgood, that the Drummonds wished to adopt Timmy. She had not then seen Timmy or the Drummonds, but the problem of the Drummonds' request was submitted to a "staffing." This was a conference which

included Osgood's supervisor, Mrs. Grape, Mrs. Dallinger, the adoption supervisor, and one or two other personnel. It is apparent that none of these staff people had seen either Timmy or the Drummonds. Miss Osgood's description of what occurred at the staffing follows:

"A. Well, it centered around the fact that we knew the Drummonds would like to adopt Timmy, and Miss Grape talked a great deal of time about she was black and she talked a great deal of the time about experiences that she had known or heard of of black or mixed race children growing up in white homes. And she had, you know, some real feelings that this was not a good plan to this type of child, that they faced too many problems as a result of that kind of placement.

So after, you know, some discussion was made about that, the decision was made for Miss Grape and Miss Dallinger to talk with the Drummonds and to try to express, you know, some of our concerns about what we felt was

in Timmy's best interest; and, also, the question was brought up that if the Drummonds were not amenable to our plan, we would move Timmy to a black foster home feeling that, you know, it would be better if we were going to have him adopted by a black couple, to have him in a black foster home if there was going to be any length of time before he was free.

Q. Was there a decision made at that staffing that you recall? Was there a vote taken in any way?

A. No. There was no vote taken. I think I commented at the time that it seemed to me that the decision had already been made.

Q. What do you feel the decision was?

A. I think the decision was that it would be in Timmy's best interest to be adopted by a black couple." (Emphasis added.)

On March 10, Mrs. Grape and Mrs. Dallinger had the Drummonds bring Timmy to the office to carry out the decision made at the "staffing." Mr. Drummond testified

that at the conference: "Mrs. Grape said she thought Timmy should be adopted by a black family." The following testimony then followed:

"Q. What did you say when you were told that Miss Grape, by Miss Grape, that she thought it would be best for Timmy to be placed with a black couple?

THE COURT: Black couple?

MRS. HAMES: Sir?

THE COURT: What did you say?

BY MRS. HAMES:

Q. Black couple. Is that the terminology they used, or black family or black parents?

A. Black family, I believe.

Q. What was your response to that?

A. Well, my wife and myself thought that we should be able to adopt Timmy, that we would like to have him.

Q. All right. Was there anything said about it being to his advantage for him to grow up in the black community?

A. I think Miss Grape said something to that effect.

Q. Did you and your wife ever ac-

cept the fact that you couldn't adopt Timmy, that he had to be adopted by black parents?

A. No, we did not.

Q. Did you ever do anything about it after you were told -- this March meeting, what did you do after that, toward adopting Timmy?

A. Well, we told them we would like to adopt him and told the case worker."

Mrs. Drummond's testimony as to this interview was as follows:

"Q. Okay. What did they tell you about whether they were going to permit you to adopt him?

A. They told us that -- Miss Grape did the talking, and Miss Grape said that since Timmy was a mixed child, that she felt, and she felt that the Department felt, that Timmy would be better off raised in a black family.

Q. Did you accept that at that time?

A. I tried to accept it. But I could not.

Q. What further steps did you take to try to adopt Timmy?

A. I called and talked with the case workers and repeatedly told them that we wanted to adopt Timmy. And then when Mrs. Osgood came out to our home, we told her how much we wanted to adopt Timmy and would they please give us another meeting, that we would try and let them know how much we wanted Timmy.

Q. Okay. Back up to the March meeting. Were you told at that meeting that you were too old to adopt him?

A. No.

Q. When did you move to Douglas County?

A. Within eight months.

Q. Did anyone ever tell you it would hurt your chances to adopt Timmy if you moved to Douglas County?

A. No, Ma'am.

Q. Would you have moved to Douglas County had you known?

A. No, indeed, had we known.

Q. Are you willing to return to the City of Atlanta?

A. We're packing to move back to

Fulton County to the City of Atlanta now.

Q. In the March meeting, did Miss Dallinger or Miss Grape discuss the community in which they thought Timmy should live?

A. They told us that they felt that he would be -- Miss Grape stated that she felt that he would be better off raised in a black community."

A memorandum for the files was prepared by Mrs. Grape as follows:

"On 3/10/75 Mr. and Mrs. Drummond, foster parents, were in the office with Timothy Hill, foster child. Nancy Hartzog kept Timothy in the playroom while Helen Grape and Kay Dallinger had a personal conference with Mr. and Mrs. Drummond. The Drummonds now admit that Timothy is a mixed race child of Black/White heritage. They did some superficial denial of the idea that this fact would cause Timothy any problems in remaining in their home. They did not, however, push for them to be allowed to adopt Timothy. As a matter of fact, they stated they could let Timothy go to a young, energetic, religious, <u>adoptive</u> couple. They

expressed primary concern that he not be moved from their home to another foster home as they believed he would not receive the quality of care they are giving him in another foster home. They feel that separation from Timothy will tear their hearts out but that they can do it because it would be best for Timothy in the long run. They seem quite accepting when Ms. Grape and Ms. Dallinger verbalized for them that Timothy would, in our opinion, make a better adjustment and have a better chance in life with a Black couple in the Black community.

We further explained our efforts to work with the natural mother, the expected time involved before we could get either a voluntary release or be prepared for court action to terminate parental rights. We said the mother was not a bad person but a sad person -- immature not ready for responsibility. We stated we needed to make further efforts to rehabilitate her before a final decision is reached. We estimated a minimum of six months to one year before we will even know if adoption is the plan for

Timothy. Ms. Dallinger explained that even the ( ) months more would be involved in working with him to fully know Timothy, select the right adoptive home, and slowly move Timothy. Ms. Drummond cried in anticipation of eventual separation. Both Mr. and Mrs. Drummond expressed appreciation in knowing the truth. The truth being 1) we are working towards adoption for Timothy outside their home; 2) it may take one to two years to accomplish this goal; 3) the rehabilitation of the mother's home is a slim possibility but still a possibility; 4) because of the excellent care the Drummonds have provided for Timothy, we (the agency) are more than willing for the Drummonds to keep Timothy on a foster care basis until a permanent plan can be made if the Drummonds are willing to keep him under these circumstances. The Drummonds committed themselves to giving the child all the love and care they can give him as foster parents and to eventually helping Timothy to separate from them and move to a permanent adoptive home. They re-

emphasized that they could 'love and let go.'

ADDITIONAL NOTE: We agreed to keep them informed of any progress that we make in working with the natural mother or in court action. Ms. Grape suggested 11/75 as a good review date since Timothy will be two years old that month. Timothy was observed on this date to be an extremely bright, highly verbal, outgoing, 15 month old baby boy. His complexion is light olive. He has a definite Afro and is a physically appealing mixed race child." (Emphasis in original.)

A letter was then sent to the Drummonds which is copied here verbatim:

"March 17, 1975

Mr. and Mrs. Robert Drummond
2390 Fabin Street, N.W.
Atlanta, Georgia 30318

Dear Mr. and Mrs. Drummond:

This is to confirm with you our understandings and agreements during our office conference on 3/10/75. As you will recall, on this date we explained our efforts to work with Timothy's natural mother and the time involved before we could get

either a voluntary release or be prepared for court action to terminate parental rights. However, we also explained that we would continue further efforts to rehabilitate Timothy's natural mother before a final decision was made. The estimated time span would be approximately six months to one year before this decision would be reached. If adoption becomes legally possible, months will be involved in working with you, fully knowing Timothy, selecting the right adoptive home, and slowing moving Timothy into a permanent adoptive home.

Both of you expressed appreciation in knowing specific steps that the department would take in working with Timothy. These steps are:

1) we are working toward adoption for Timothy outside your home;
2) it may take one to two years to accomplish this goal;
3) the rehabilitation of the mother's home is a slim possibility but still a possibility;
4) because of the excellent care

you have provided for Timothy, the agency is happy for you to keep Timothy on a foster care basis until a permanent plan can be made, if you are willing to keep him under these circumstances, and you stated in our meeting that you wanted to keep him until a permanent plan could be made.

You committed yourselves to giving Timothy all the love and care that you could give him as his foster parents and also eventually to helping Timothy to separate from you and move into a permanent adoptive home. Thank you for your love and concern for this precious child.

Sincerely,
Ms. Kay Dallinger
Casework Superivsor
III -- Adoptions
Mrs. Helen Grape
Casework Supervisor
III -- Foster Care"

Mrs. Drummond testified that they continued to make known to their caseworker thereafter their desire to adopt Timmy. This is confirmed by Mrs. Osgood,

their caseworker, who testified:

"A. After I read this [the memorandum of March 11, supra] I thought, well, that perhaps things had been resolved with the Drummonds and that it appeared that they were in agreement with us. So I went out to do the foster home re-evaluation interview thinking this was decided and that they would have, you know, have been in agreement with this plan for Timmy. I was really surprised when I got out there, because to hear their interpretation of it, that they were not in agreement with it at all.

And, you know, I don't know whether it is because they had changed their minds in the interim period or whether we had heard what we wanted to hear in the interview, but at any rate, they certainly were not in agreement with what this states when I went out there.

Q. What did they want to do when you went out there? What was

their opinion? What was their approach to you?

A. Well, they had stated that they had been talking with their foster care worker who was Mollie Bartlett at that time and were requesting an interview with the adoption staff to, again, state their desire to adopt Timmy.

Mrs. Drummond said she had not heard anything about it, and so I told her after I wrote up my evaluation that I would write a memo to Mrs. Dallinger bringing it to her attention that the Drummonds were still interested. I did that soon after the evaluation.

Q. Go ahead.

A. I received a reply stating that the Drummonds would be given an interview after Timmy's termination hearing."

On August 15 Miss Mollie Bartlett wrote a memorandum to Mrs. Dallinger as follows:

"On 3-10-75, you met with Mrs. Grape and the Robert Drummonds, Timmy's foster family. At the conclu-

sion of the conference the Drummonds were planning to care for Timmy until he was freed for adoption and to help him adjust to the adoptive home when adoption occurred. For a short time they seemed to fully accept the premise that Timmy would be better placed in a black home.

Today, after nearly six months, the Drummonds are requesting an opportunity to be reconsidered as adoptive parents for Timmy. They have no reservations about their acceptance of a mixed race child. Mrs. Drummond's health had once seemed questionable, but her doctor found gallstones and as soon as she has surgery, she foresees no further health problems."

Mrs. Dallinger replied:

"In response to your memo regarding the Drummonds' renewed interest in adopting Timmy, I have learned that the termination petition has been filed and the hearing set for 9/25/75 at 9:30. Under the circumstances the Drummonds should bring Timmy to the office for the hearing, and you should bring him to the juvenile court.

I personally feel that the Drummonds are back into their earlier denial pattern. The approach I recommend for you is to stall with no encouragement. Example ... 'No one can be considered for the adoption of Timmy until he is freed. Adoption staff would have to carefully examine any possible home for Timmy, particularly a white home such as yours. I don't want to encourage you. The best thing for you to do is think about this some more and discuss this with the adoption staff. If and when he is freed, I have advised adoption that you have changed your mind.'

Thank you for alerting us to the situation." (Emphasis in original).

Thereafter, about August 25, Mrs. Osgood made the re-evaluation as a result of which she described the foster parents in the following terms:

> "The foster parents provide excellent care. They are unusually attentive to the child's medical and emotional needs and feel as if they are the 'natural' family."

Under the heading on the evaluation form

"Particular Strength of Home," Mrs. Osgood wrote"

> "The Drummonds have accepted a mixed race child and have handled the attendant problems well. They are a very loving, warm family."

Finally, she made the following recommendation for the Drummonds as foster parents: "I recommend this home for a child of either sex, age 0 to 3."

This re-evaluation report was accompanied by a memorandum again addressed to Mrs. Dallinger:

> "I recently did the foster home re-evaluation on the above named couple. As you will recall on March 11, 1975, you and Helen Grape interviewed Mr. and Mrs. Drummond regarding their expressed interest in adopting Timmy. For your convenience a copy of the notes from that conference are attached.
>
> I spoke with Mr. and Mrs. Drummond for over two hours and during this time I also had a chance to observe Timmy. As a result of my conversation I have the distinct impression that the Drummonds did not adequately express

their feelings in the March 11th interview. In the foster home re-evaluation they stated unequivocally and emphatically their desire to adopt Timmy. They rejected the notion that he would make a better adjustment in a Black home by pointing out that Timmy has has always been around White people and this has been incorporated into his self-concept. They do not understand why we would remove a child from a home where he has been since birth and replace him because we believe he will have a better 'chance' in the Black community.

The Drummonds expressed their intention to give Timmy every opportunity possible to develop as a human being, regardless of race. I talked with them about community acceptance and the possibility of Timmy dating a Black girl when he gets older. The Drummonds acknowledged that Timmy would be 'different,' but felt he would have problems in the Black community also. They noted that Timmy would make his own decisions as to who he would date and they would have no

objections to his choice. They pointed out that they make no secret of Timmy's Black heritage and felt that they would deal forthrightly with Timmy on this subject.

Timmy is an exceptionally well-adjusted child. There is no question that he is the center of this household. He talks in sentences, counts to ten, and shows off for visitors by strumming the guitar and singing gospel songs. The fact that he is bright, active, and friendly is a tribute to the excellent care he is receiving from these parents.

Because of the intensity of their feelings for Timmy, the Drummonds are again requesting a conference with you to discuss adoption. I believe they will explore every possibility in their efforts to keep Timmy first within the agency, but using outside resources if it becomes necessary.

I hope this information will be helpful. I understand Timmy's termination hearing is set for September 25th, 1975."

To this memo Mrs. Dallinger replied:

"Thank you for your memo of 9/3/75 concerning this case. I have discussed the case with Ms. Staten. We feel it is inappropriate to decide the matter prior to termination proceedings on 9/25/75. I will throw the issue open to the adoption committee at the end of September, if he is freed. Regardless of any decision made, you may assure the Drummonds that they will be given further interviews with me or other adoption staff about this matter. Early October would appear to be the best time for this and I will see that they are contacted. Please loan me any case files you have on the Drummonds."

On September 25, the Juvenile Court of Fulton County entered what is known as a "Termination Order," ending the parental rights of Timmy's natural mother and placing his custody in the Georgia Department of Human Resources, Division of Family and Children Services, granting the Division the right to place Timmy for adoption.

Thereupon, on October 3 a "Social Study on Child to be Placed" was made for Timmy. It was made by an adoptions case-

worker named Phyllis Jonas. This study described the child as having "medium olive" skin, "dark brown," "thick rather coarse and wavy hair" and as being a "very attractive child," normal physically and mentally, stating "child is well adjusted and happy. He is a bright verbal child."

This study was followed by an "evaluation interview" by caseworker Brenda B. Payne. Her report, which contained a recommendation that the Drummonds be permitted to adopt Timmy, is quoted in full:

> "Mr. and Mrs. Drummond arrived early for their interview. They brought Timmy with them. He continues to be an extremely alert, happy and attractive child. While I interviewed the Drummonds, Mrs. Holloway, Timmy's worker care[d] for him in the playroom. The Drummonds were obviously very nervous and anxious at first.
>
> Initially I reviewed the past events with them, their meeting with Mrs. Dallinger and Mrs. Grape, the decision made at that time, and their change of heart later. As Ms. Hauben's contacts indicated, the Drummonds have had a chance to think about their interview last spring,

and have come to the conclusion that adoption by another couple may not be what is best for Timmy.

The Drummond's expressed their feelings that although everyone wants to do 'what's best for Timmy' on reconsidering they seriously wonder if placing him in another home, and putting him through the trauma of a move would be in his best interest. The agency seems to be saying that putting him in a black home would be the prime consideration thinking 'what's best for Timmy.' The Drummonds stated they felt they knew Timmy better than any agency personnel, they've cared for him, watched him grow and develop, and perhaps they know best what would be best for him.

I told the Drummonds that part of my functions was to sit down with them and think together what would be best for Timmy -- that frankly none of us were really sure of what would be best at this point. I spent a good deal of time in finding out about the Drummond's orientation toward blacks and the black community. Although the Drummond's admitted to have some degree of racial

prejudice in long years past, due to their age and society's focus (?) they felt that their ( ) had change[d] every year before getting Timmy. Mr. Drummond states he's had lots of relationships with blacks thru his job, and has worked under a black supervisor.

He spoke in positive terms of these relationships. Mrs. Drummond said she had worked as a nurse several years ago and had worked closely with many black people and she also said that with their contacts with people in the gospel singing world, many more blacks were involved as musicians and performers than in years past. They had worked closely with many black performers and seen [sic] able to form very good relationships with them.

Although there are no blacks living in their area in Douglasville, Mr. Drummond remarked that they live in a subdivision with many young families. He stated they had never had any problems with Timmy's being accepted by the neighbors, and seemed to feel that the young adults of today are much more accepting of people of other races. The

Drummond's indicated that Timmy had been enrolled in an integrated kindergarten setting, but Mrs. Drummond was advised to take him out for awhile by Timmy's doctor due to his bouts with tonsillitis. The public school nearby is integrated; however, the majority of the children who attend are white.

We talked some about whether or not Timmy understand[s] he's different yet. They said that he's really too young to yet be aware that he is, but as he gets older they certainly will try to be as open with him as they can about his heritage and race. (According to Ms. Holloway with her contacts with Timmy it is evident he's not yet aware of any colors yet and cannot identify by name colors like red or green, or cannot say what color he is).

Although Timmy has not yet noticed that he is different Mr. and Mrs. Drummond were certainly able to acknowledge that other people have noticed. They are aware that Timmy will be noticed and are aware they will have to help him through many hard times in

his life. Mrs. Drummond said she knows they will have to handle people reactions to Timmy; they certainly don't deny they've already had to handle stares and comments from people of both races. Mr. Drummond said people of both races. Mr. Drummond says people stop and ask what nationality he is and he tells them. He says he wants Timmy to be proud of the fact that he is part black. Mr. and Mrs. Drummond both said that although they've [sic] certain Timmy may face ridicule or rejection at times, they feel if he has their love and support, as well as his gift of openness, friendliness, and very high intelligence, that this would enable him to have a happy and secure life. Mrs. Drummond expressed her belief that ( ) was responsible for making Timmy such an exceptionally gifted and friendly child, so that in spite of problems about his race he will be liked and accepted by those who come to know him personally.

The Drummonds are very much aware of Timmy's exceptional mental abilities. They definitely plan to send him to

college if he wants to go, and stated they hoped maybe he would want to be a professional person such as a doctor or lawyer. I feel they recognize that he may need much more stimulation as he gets older, and seemed willing to consider outside resources, special schools or tutors in order to help him reach his potential.

When we talked in detail about some of the specific problems Timmy might face because of his race, Mrs. Drummond reacted in a strongly protective manner. She said if she ever heard of a teacher or anyone else giving him trouble because of his race, she'd 'go down there and give them a piece of my mind.' I tried to help them see that while it would be good to support Timmy during these times that if they're over protective they wouldn't give Timmy the chance to become independent and able to stand up for himself. I noted, that one of the advantages Timmy would have in a black home would be that he would be given survival skills, would be given guidance from people of the black race as to how to

protect himself and win difficult situations. It would be much easier for a black parent to give him these skills than would a white parents, as they would be teaching him from their own experience. Although the Drummond's understood what I was saying, they felt that the most important thing Timmy needed to be secure and happy about himself, was to have parents who truly loved him.

We talked about how the rest of the Drummond's extended family felt about Timmy. The Drummond's said that all of their family, their brothers and sisters, and Mrs. Drummond[s'] mother dearly loved Timmy. Mr. Drummond's parents are deceased. Mrs. Drummond said her mother called her before our meeting today to say she'd be 'waiting by the phone to hear the results.' Evidently the whole family is behind the Drummonds 100% and Timmy is fully accepted by them all.

I spent a lot of time in talking with the Drummonds about things they might have to face with Timmy--the social pressures, the feelings of insecurity he might have, and especially

problems which might arise during adolescence in regard to dating and peer group relationships. I gave them true case examples from articles I'd read about blacks raised in white homes, although I did have to admit there were both very negative and positive experiences these children had. The pros and cons were about equal in those situations. I showed the Drummonds pictures of our foster child Jackie who is a mixed race five years old, showing how much he had darkened over the years.

As I expected, none of these things seemed to change the Drummonds mind. They felt they love Timmy now and will always love him regardless of what color he becomes or what culture he wants to identify with. They indicated that the agency thought they were good enough to raise Timmy up till now, so on what basis other than race were we unwilling to consider them as adoptive parents. Mr. and Mrs. Drummond were not hostile, toward this agency, but they again stated they felt that the fact that they loved Timmy and he loved them was the most important thing for the agency to consider.

I tried to discover how far the Drummonds would be willing to prepare themselves should they be allowed to raise Timmy. They would be willing to do anything we suggested to go through a series of intensive interviews with black caseworker to help them understand the black culture and heritage, to read books and other literature in order to educate themselves in the black experience, and to talk with their own black friends at work about their feelings and experiences about being black. They were extremely cooperative and seemed willing to accept any help we could give them. They were very interested in hearing about the Buechle couple and would be very interested in being put in touch with them.

At the present time our relationship with the Drummonds remains good. They are not hostile or angry and are very willing to accept supervision or guidance from us. However, they did make it clear they loved Timmy enough to fight for him and would take the matter to court if necessary. I do fear

if this result[s], and the Drummond's win in court we would have damaged any chance we would have to give them guidance and help in raising Timmy, as our relationship with them would most probably be destroyed. They are pushing for a decision to be made soon. Mrs. Drummond says this situation has caused them lots of worry and heart-ache; she said Timmy is at a crucial period in his life, and he needs to be given some security, instead of living under this threat of removal. The Drummonds understand the decision is not mine to make, that it will be a committee decision, they do ask that this matter be resolved soon for every-one's sake. I told the Drummonds they would be notified of our decision as soon as possible.

Observation and Recommendations:

In thinking about the agency's position in this case I still can see it remains a two-sided thing. In my brief contact with this family I have both positive and negative feelings as have other workers.

I was concerned about how intensely the Drummonds relate to Timmy; it turns me off a little to see them getting him to 'perform or do tricks.' The reasons for this may be positive or negative-- he may be a novelty or toy for them, or they may just be over-emphasizing his achievements and getting him to perform to prove to caseworkers they are taking good care of him and stimulating him. I don't know what may be the cause, but I definitely hope this pattern would not continue as he grows up. I also understand from other workers that Mrs. Drummond has an almost hypochondriac focus on Timmy's health. There definitely is a fear he could be pampered, spoiled and over protected by them.

Also, on considering the Drummonds age and background, it does seem their attempts to help Timmy understand his black heritage will be admittedly artificial though sincere and honest in motivation. Whether or not the Drummonds can become comfortable with the subject of race over the years, so that their attempts will be natural and spontaneous is anybody's guess.

I also am very much aware that in intellect and intelligence Timmy is far above the Drummonds. Although they can offer adequate stimulation now, who is to say how much they'll be able to stimulate Timmy as he grows up. Certainly to 'waste' his intelligence would be a shame, although if he develops a trauma because of being moved he could become a very intelligent culture but perhaps insecure and unhappy individual.

On the positive side I can definitely see that Timmy is loved by the Drummonds, and he loves them. They do not seem to have tried to 'hide Timmy' and are constantly taking him to public places, gospel shows etc. They seem to have so far instilled in him a good feeling about himself and he seems happy and well adjusted. So far they seems [sic] able to deal with his racial identity in an acceptable manner. The Drummonds do have more involvement with blacks than we had first thought, and do seem to be in the early stages of developing healthy attitudes about black people.

The fact that their other family members are supporting them about Timmy is also a positive.

Because the Drummonds are not from the kind of upper-middle class achievement oriented home most caseworkers come from it does make it hard to visualize seeing Timmy grow up 'successfully' in this kind of culture. However who really can say what kind of environment is best to grow up in?

In conclusion, I personally feel for several reasons we should let Timmy remain with the Drummond's, in spite of our concerns. Either way there are risks and no guarantees. The fact that there prsently are no appropriate homes for Timmy, and the fact that he might also experience some rejection by some members of the black community due to his 'whiteness' is also a consideration. Also my concern that we most probably would be facing court action by the Drummonds with some doubt as to the 'strength of our case' is also a factor. For Timmy's well being I do not feel that a long court involvement would be beneficial regardless of what the courts

decision is. The Drummonds are evidently living under a great deal of stress and eventually this may be transferred on to Timmy.

I do feel that a group consensus, is probably the best way to decide what to do. This certainly is too risky a situation for any one person to make the decision alone. I hope the group will be able to meet and decide some thing soon."

Acting on Mrs. Payne's recommendation a group was called on November 11 to conduct a "staffing," which is apparently a word of art to describe a discussion by staff personnel who presumably are experienced in the area of concern. Of the 19 persons present at the staffing the record does not indicate that more than four had seen Timmy or the Drummond family. Of the six or seven caseworkers and supervisors who had seen the child and his foster parents, it appears that Mrs. Grape, Mollie Bartlett, and Barbara Osgood were not present at the staffing. The record does not clearly establish the precise time, place or form of the final action which the defendant Department or its officials took that

denied the Drummonds' request to adopt the child. Neither does it show precisely what authority any one of the participating staff persons had to make the final decision. It appears that the officials treated the vote taken at the staffing as representing final denial of the Drummonds' request. In any event, Mrs. Drummond testified that a few days after the staffing, she and her husband were called to the office and met with Mrs. Dallinger and Mrs. Holloway and that the former said to them: "I am sure that you are both very anxious to know what has happened and we called you in to tell you that the decision still stands, that we feel that Timmy will be better off adopted by a black couple or a black family."[2] (Emphasis added.)

At the trial, during her testimony, Mrs. Dallinger gave a different interpretation of the March conversation, saying that the reference to black family was to indicate that it would be more likely that a black adoptive home would be available.

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2. Apparently the only "decision" to which reference could be made was the decision made at the March 11 staffing which, it will be remembered, preceded the first meeting between Mrs. Dallinger and Mrs. Grape with the Drummonds.

Her testimony follows:

"Q. Actually, you had made a tentative decision at the March meeting to place him in a black home if you gained the parental rights?

A. I thought that would be the likelihood of the home that would be available, but even all the way through after the final decision was made when I asked the State for homes, I did not ask for black homes. I asked for whatever homes were available for this child.

Q. Reading again from your testimony in your deposition on page twenty-six, 'So there had been a request to adopt that you know'--talking about the Drummond--'is that right? And the request had been made in spite of your knowledge of his mixed race, of his being a mixed race child?

A. That's right.

Q. Did you verbalize an opinion that he would be better, make a better adjustment and have a better life with a black couple in the black community?

A. Yes, I did.

Q. Did Miss Grape verbalize that?

A. Yes.

Q. Actually, you had made a tentative decision at that time to place him in a black home if you gained--had his parental rights terminated; is that correct?

A. That's right.'

Q. Did you make that--

A. That was a tentative decision that he would go into what we thought would be probably a black home. You have to understand the supplies of homes that are available."

Mrs. Dallinger testified further about the November meeting:

"Q. ... In the November meeting did you tell Mr. and Mrs. Drummond that the decision had been made to place Timmy in a black home?

A. Yes, because then we had made the final decision that they could not adopt, and we had then selected the home, so, yes, we knew the home then.

Q. Did you have the --

A. That was definite then.

Q. At the time you told them?

A. Uh huh. In November. I told the characteristics about the home that had been selected, you know, that I thought maybe would help them realize Timmy was going to go to a good home.

Q. At the time I'm talking about, maybe, the staff meeting, the decision was made there to place Timmy in a black home?

A. In the staffing meeting?

Q. In the staffing meeting.

A. No. We didn't decide where to place Timmy. We decided that we would place him for adoption outside of their home. We were trying to make a decision in that meeting whether it would be in Timmy's best interest to leave him with the Drummonds and allow them to adopt him or place him up for adoption outside, to seek adoptive homes outside of, you know, of them.

Q. Did you not decide at that meeting that Timmy would be placed in a black adoptive home?

A. No. I don't believe so. I think we talked about, again, in terms of the

supply, we thought that was probably what would be available.

THE COURT: Show her this last paragraph.

[The last paragraph reads: 'A vote was taken and it was a group decision that it would not be in Timmy's best interest to leave him in the Drummond home, and that we would begin immediately to look for an appropriate black adoptive home. Although this was a difficult decision it was felt that Timmy's long range best interest must be the focus.']

BY MRS. HAMES:

Q. Referring to Plaintiff's Exhibit 15, the discussion of race, I would ask, that purports to be notes from that meeting, and I ask if that correctly sets forth the decision?

A. These are not my notes. That may have been the understanding of the person that wrote these notes.

Q. So you are denying that now?

A. Huh?

Q. You are denying that the decision was made at that meeting to place Timmy in a black home?

A. We talked in that meeting about mixed children and where they seem

to adjust better and what kind of black couple--what kind of a white couple could accept these children, you know, what were the characteristics of those couples. I think our general feeling, you know, at the end of that meeting that it would likely be a black home, you know, available for him that would fit those requirements, but like I said, you have to understand the procedure. After we rule out one home, then we look at the pool of homes available, and we look at all homes available. But in the minds of all of us at the meeting--

Q. Did you have a black home available?

MR. MOTE: Your Honor, I think she was in the middle of her answer.

THE COURT: Did you complete your answer?

MRS. HAMES: I'm sorry ...

THE WITNESS: What did I start to say?

MR. MOTE: I think you were saying in the minds of us at the meeting--

THE WITNESS: Well, we knew about the pool of homes in Fulton County. That is the homes that we recruit, study, develop, this kind of thing. And we had already looked there, and we

knew there was no suitable white or black homes. There were both black and white homes approved and waiting for children, but none that we thought met Timmy's other needs.

So we didn't feel like we had a home in Fulton, and we knew we would have to ask the State. And we've had a number of mixed race children lately, and we haven't gotten but one white home that I know of in a long time for a mixed race child. That was a home studied by Child Service and Family Counseling, and then we've had one mixed marriage home, you know, available in the county that we could have looked at for Timmy, which we did, I believe. So we already, you know, had some awareness of what the supply of homes available for him were. The supply didn't include any white homes that we knew of.

(Emphasis added.)

Finally, Brenda Payne, whose re-evaluation recommendation was that the Drummonds be permitted to adopt Timmy, and who was present at the staffing, testified at the trial:

"Q. Did you interview the Drummonds in connection with their desire to adopt a child by the name of Timmy?

A. Yes.

Q. Did you also participate in a staff meeting in November in which the question was considered?

A. Yes.

Q. I hand you Plaintiff's Exhibit 15 and direct your attention to the paragraph numbered seven.

A. Yes.

Q. In the second paragraph there, it says: 'After discussion, the staff was convinced if we left him in his present environment, we would be giving him problems he would not have if placed in a black home.'

A. I've lost where that is. Where would that be?

Q. Excuse me. The second paragraph under seven.

A. At present Timmy is so young? Oh, I see. Okay.

Q. And then it goes on to say: 'A vote was taken, and it was a group decision that it would not be in Timmy's best interest to leave him in the

Drummond home and that we would begin immediately searching'--is that what this is--'and'--

A. Immediately to--I don't know. 'Seek' maybe? 'Seek,' maybe, an appropriate--

Q. Search immediately for an appropriate black adoptive home; is that correct?

A. Yes.

Q. Okay. Was that the decision of that meeting?

A. Yes. That the Drummonds would not adopt Timmy.

Q. What about that you would seek a black adoptive home?

A. I believe that was the decision."

The Dummonds were not present at the "staffing" of November 21. No physician or psychiatrist was present. The Drummonds were not given an opportunity to present any statements or evidence and there is no indication that they were put on notice of the basis on which the decision might rest. Of course, it is apparent from the face of the documents that no findings of fact were made as to any of the possible grounds of challenging their qualifications as adoptive parents. i.e., on account of being foster parents, being older than desirable, or not being in good health or of limited intellectual capacity. It is

apparent that they were attempting at all times to resist only the possible removal of Timmy to a black family or home, because of his being a mixed race child.

As indicated already, it is impossible to determine precisely what authoritztive tribunal or responsible official actually made the decision and, of course, it follows that it is impossible to tell the basis on which the decision was made. The record clearly establishes two elements that could not have provided an automatic basis for disqualifying the Drummonds. These two elements, which were discussed by the parties at the trial and are added as make-weights on appeal in an effort to support the action of the Department, are the mere fact that the Drummonds were foster parents and the fact, standing alone, that Mrs. Drummond at the time of the staffing was 51 years of age and her husband was 39. The record clearly eliminates these factors as automatically excluding the Drummonds from consideration in view of the consistent pattern by which the participants repeatedly stated, after all of the facts with respect to the Drummonds' age and their status as foster parents were fully known, that they were given full consideration as adoptive parents by the

Department. This is not to say that in passing on the qualifications of the Drummonds as adoptive parents those responsible for making the decision could not take into consideration the actual age of the persons involved. It merely excludes the age factor and the somewhat discussed policy of discouraging adoptions by foster parents as automatic grounds for justifying the denial of the Drummonds' application.

We have outlined as fully as we have the record facts not in order to weigh them and determine whether they would have warranted the proper officials from arriving at the same ultimate decision as announced by Mrs. Dallinger to the Drummonds after the staffing. We have given these facts to show the substance back of the plaintiff's contention that they were deprived of what they describe as the right to parentage under the theory that a close familial attachment to Timmy with the consent of the defendants over a period of two years created a protectable interest in the relationship under the Fourteenth Amendment to the Constitution of the United States. The recitation also shows the substantial nature of the equal protection claim of the Drummonds, that is to say that even if they should concede that they had not acquired any protectable interest in their family relationship with Timmy,

they, nevertheless have been denied equal protection of the laws as guaranteed by the Fourteenth Amendment, because they were not permitted to compete equally for the adoption of this mixed race child because, as they allege, the defendants denied their request for adoption arbitrarily because of their race.

In the ensuing trial in the district court in which the Drummonds urged their contentions, the court, without dealing specifically with the due process clause, concluded that the decision of the defendants did not violate either the plaintiffs' § 1983 or constitutional rights.[3]

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3. The court's verbal order follows:

"THE COURT: All right, I'll rule for the defendants. This case comes to the Court on a complaint, the crux of which is that the defendant's refusal to place said child with plaintiffs for adoption, based solely on racial grounds, is an unconstitutional denial of equal protection of the laws and an unlawful violation of the civil rights of the plaintiffs.

Therefore, the issue before the Court is to determine whether the decision of the Department of Fulton County Department of Family and Children Services was one solely based upon the impermissible criteria of race, or whether the race, to the extent that it entered into the decision, was only that legitimate consideration thereof which is--which the Court holds necessarily as required in determining the proper placement of a child.

It is obvious that race did enter into the decision of the Department. The Court has read from beginning to end each of the exhibits which

Following denial of their claim by the district court, the Drummonds filed a suit in the Superior Court of Fulton County, in which they alleged a denial of their rights as foster parents without a due process hearing and also alleged denial of their rights under the equal protection clause of the Fourteenth Amendment. That court dismissed the suit and the Georgia Supreme Court has affirmed, Drummond et al. v. Fulton Co. Dept. of Family & Children Services et al., 237 Ga. 449, 228 S.E.2d 839 (1976). In

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have been submitted by the Plaintiff, some of which throw considerable light on the question, particularly the question, particularly Plaintiff's Exhibit 15, if I'm not mistaken.

THE CLERK: Here is 15, Your Honor.

THE COURT: Which shows just--which, as far as the Court can tell, although here is no date on it, affords a contemporaneous version of the actual decision that took place, and where it is obvious that race did take place, it appears to the Court therefrom that the consideration of race was properly directed to the best interest of the child and was not an automatic-type of thing or of placement, that is, that all blacks go to black families, all whites go to white families, and all mixed children go to black families, which would be prohibited.

In fact, certain statistics indicate that despite the difficulty, despite the difficulty of determining proper homes for mixed race children as is shown by Plaintiff's Exhibit 19, nevertheless, the interrogatories--answers to interrogatories which have been received, show that there have been some placements of mixed race children with white parents.

its decision, the Georgia Supreme Court discussed the Drummonds' contention as follows:

> "The Drummonds next urge that any application of the 'best interests of the child' rule necessarily implies some de facto rights arising from the psychological dependency of a parent-child relationship which has been sustained over a period of time. Plaintiffs' expert witnesses testified to the trauma of separating a young child such as Timmy from the only parents he has ever known at an age when the separation could not adequately be understood or explained to him. See Alternatives to Parental Right in Child Custody Disputes Involving Third Parties. 73 Yale L.J. 15 (1963).

So, apparently, it is not an automatic-type of placement which the Court holds to have been forbidden. Therefore, the Court feels that the Plaintiff has not made out a prima facie case under Title 42, Section 1983, of the Code of the United States or the Fourteenth Amendment to the Constitution of the United States.

I dissolve the temporary restraining order, refuse to issue the preliminary injunction, and will dismiss the case. I want to say at this point, though, that I am very much afraid from what I have seen in the papers and from the questions which have been asked and so forth that people have been, perhaps, even the plaintiffs here, have been under the impression that this Court has plenary authority with respect to this matter to determine which is the proper or the best home for adoption, that is, to make a choice between the Plaintiff's home and the home of whoever has been selected by the Fulton County Department. That

The best interest of the child test has been adopted in many jurisdictions. (citations omitted). This rule contemplates a presumption that the best interests of the child lie with the natural parent, but that this presumption may be rebutted by clear and convincing evidence to the contrary. In re Confessora B., supra [75 Misc.2d 576, 348 N.Y.S.2d 21].

The Georgia law, however, has not followed this pattern. The best interests of the child test is used only between parents who both have equal right to the child. Code Ann. § 74-107; Knox v. Knox, 226 Ga. 619, 176 S.E.2d

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is not the function of this Court at all. If there has been some error in the handling of the case by the Fulton County Department of Family and Children Services, so far as the Court knows, at least the Plaintiff so alleged, it is subject to the Georgia Administrative Procedure Act, in which case the Georgia courts will have authority to determine whether the procedures have been violated. And, perhaps, although the Court does understand that there is a large discretion vested in the Defendant Department, that if there have been any procedural irregularities, the Georgia courts can cure those irregularities. But so far as this Court is concerned, it has had before it the very narrow question of whether the question of race impermissibly entered into the decision of the Defendant Department so as to block the legitimate consideration of factors which ought to have been made by them.

This record, as submitted by Plaintiff, the Plaintiff's case did not show a prima face [sic] case, and the Court finds it has no alternative

712 (1970). Where the dispute is between a natural parent and a third party, on the other hand, the court must award the custody of the child to the parents unless he has lost his parental prerogatives under Code Ann. § 74-108 or is unfit. Edwards v. Cason, 237 Ga. 116, 226 S.E.2d 910 (Other citations omitted.)

The Drummonds ... misconstrue the Georgia law in assuming that the best interests of a child rule applies to foster parents. Without this test and its focus on the child, there is no basis for recognizing any right in the 'psychological parents.' Since the focus in determining whether a third party is entitled to custody is on the natural parents and whether or not they have forfeited their rights or are unfit ... any relationship between the child and his foster parents is primarily irrelevant. Stuckey v. Jones, 212 Ga. 495, 93 S.E.2d 719 (1956); Watkins v. Terrell, 196 Ga. 651, 27 S.E.2d 839 (1943)....

We thus find no merit in the Drum-

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but to dismiss the action and dissolve the injunction and it will be so ordered. And the Defendants may submit an order within seven days."

monds' claim of right by virtue of their status as Timmy's foster parents. The trial court did not err, as alleged in Enumeration 3, in denying any legal rights to foster parents who have cared for a child for more than two years and are his psychological parents.

Enumeration of error 7 urging that the trial court erred in holding that the Drummonds were not denied due process or equal protection under the Fourteenth Amendment must also fall under our holding that foster parents have no right to adopt a foster child and thus no right to contest the agency's withholding of consent."

The Georgia Court then dismissed the Drummonds' claim to due process on the theory that their right to adopt a child under Code Annotated Section 74-402 is a "protectable interest" which the Court stated was limited by the principles announced in Bd. of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The Court then said:

> "They in fact were given the right to apply, they were interviewed and the application denied. As we have already noted, the agency's discretion as to which adoptive family will be

chosen is absolute and the Drummonds have no rights beyond being considered. Furthermore, the United States Supreme Court has made clear that property interests are defined by state law. Bd. of Regents v. Roth, supra. The law of Georgia very clearly provides no rights in foster parents to adopt."

The Court then further concludes:

"We thus find no basis for due process protections in favor of the Drummonds, and the equal protection arguments must also fail for the same reasons."

II. "LIBERTY" RIGHTS AS REQUIRING DUE PROCESS

As the trial court recognized, a state statute or state policy that every child having mixed black and white parentage could not be adopted by a white family could not be countenanced under the United States Constitution. In Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1966), speaking of a state statute that prohibited the intermarriage of black and white persons, the Court said:

"These statutes also deprive the Lovings of liberty without due process of law in violation of the Due

Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942). See also Maynard v. Hill, 125 U.S. 190 8 S.Ct. 723, 31 L.Ed. 654 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State. ..."

While not as fundamental as the right to marry, the right "to ... establish a home and bring up children ..." has been stated in Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), to come within the concept of liberty as guaranteed by the Fourteenth Amendment. While focusing principally on property rights in Bd of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1971), the Supreme Court nevertheless discussed the concept of liberty as guaranteed by the Fourteenth Amendment:

> "While this Court has not attempted to define with exactness the liberty ... guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ...

> as essential to the orderly pursuant of happiness by free men.' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 499-500, 74 S.Ct. 693, 694, 98 L.Ed. 884, Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551."

In Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 where an attack was made on the District of Columbia's segregated school system, the Court discussed the interplay of the Fourteenth Amendment's equal protection clause and the Fifth Amendment's due process clause. The Court there said:

> "The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[2] (Citing Detroit Bank v. United States, 317 U.S. 329, 63 S.Ct. 297, 87

L.Ed. 304; Currin v. Wallace, 306 U.S. 1, 13-14, 59 S.Ct. 379, 386, 83 L.Ed. 441; Steward Machine Co. v. Davis, 301 U.S. 548, 585, 57 S.Ct. 883, 890, 81 L.Ed. 1279).

Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.[3] (Citing Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194; Hirabayshi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774). As long ago as 1896, this Court declared the principle 'that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race.'[4] (Citing Gibson v. Mississippi, 162 U.S. 565, 591, 16 S.Ct. 904, 910, 40 L.Ed. 1075. Cf. Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 198-99, 65 S.Ct. 226, 230, 89 L.Ed. 173). And in Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, the Court held

that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law.

Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." 347 U.S. at 499, 74 S.Ct. at 694.

While it is true, as stated by the Georgia Supreme Court, that property rights that are protectable under the due process clause of the Constitution are generally created by state law, a determination of what is a "liberty" interest has been a

matter of federal constitutional law. Meyer v. Nebraska, supra; Bolling v. Sharpe, supra; Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551. Thus, while this Court recognizes the Georgia Supreme Court's decision that the Drummonds have no "property" interest in their plea to adopt Timmy, arising from their being "psychological parents" of the child, the absence of such right does not foreclose the claim that they have a "liberty" right of which the State cannot deprive them without a due process hearing. It seems clear that a person who seeks to exercise the right enjoyed by all other persons to adopt a child has the same liberty interest to protect as does a person who seeks the right to marry. Neither can be denied or hedged about by arbitrary classifications, nor solely on the basis of race.

III. EQUAL PROTECTION AND PROCEDURAL DUE PROCESS

Furthermore, the Drummonds claim that even should the Court decide that they have no liberty right to be protected by the due process clause, they nevertheless are entitled to the benefits of the equal protection clause of the Fourteenth Amendment. They say that this right has been denied them

because they have been denied the opportunity to adopt a mixed race child because of a rule or policy of the defendant Board that such a child will, as a matter of course, be placed for adoption only with black parents, if available. They say further that whether such policy exists and was the basis for the rejection of their claim to adopt Timmy could not be resolved in the manner in which the defendants acted, but can be determined only after a hearing before an adequate state administrator or tribunal with at least minimal procedural due process.

The defendants contend that the record, which we have attempted to outline above, supports the trial court's determination that the defendants did not use the factor of race impermissibly in denying the Drummonds' right to adopt the child. They further argue that there is no protectable interest under the Fourteenth Amendment of which the state action has deprived them. Thus, they contend that no process is due in the decisionmaking that resulted in their denial. Furthermore, they argue that even though the Drummonds assert that they have been denied equal protection of the laws by reason of an alleged racial policy

for excluding the Drummonds with respect to this child, this does not entitle them to any hearing that would meet minimal due process requirements.

As is already clearly indicated, neither the Drummonds nor Timmy were accorded elemental due process in the proceedings that resulted in the termination of the Drummonds' familial relationship with the child and in his being finally and irreversibly taken away from the only parents he had known during his infancy. It is apparent that such decisions as were made were made ad hoc by discussions, conferences or committee votes without those participating having any established standards for decisionmaking. Moreover, it is perfectly clear that the record now available is strongly suggestive of the fact that the decision was made before the first time the Drummonds were interviewed and that at no time thereafter were they given an opportunity to meet any set of required standards either by evidence or other proof. As a result, it is impossible to determine what actual ingredients went into the decision that was finally made to deny the Drummonds the right to adopt the child.

The one recurring theme that more than arguably runs throughout the record is the one dealing with race and the desire of the caseworkers and supervisors to explain to the Drummonds not what other reasons existed for their not being permitted to keep Timmy, but to explain to them why the underlying policy existed, such policy allegedly being that if a black family was available, a black or mixed race child would be placed with such family rather than with a white family. As we have already noted, such a policy would be impermissible but no one can say with any assurance on this record that any other factor was the basis of the final action taken.

We have already discussed the existence of a libery interest in the Drummonds. We now turn to the question whether their contention that they have been denied equal protection of the laws because of the alleged policy of the defendants entitles them to a hearing. This Court has recently held that in the field of state employment, a nontenured teacher is entitled to a due process hearing where he "asserts that he has been dismissed for constitutionally impermissible reasons." The Court held this in a case in which it also decided that such

teacher had no such reasonable expectation of employment as would bring him within the rule of Bd of Regents v. Roth, supra. In Megill v. Bd. of Regents of the State of Florida, 541 F.2d 1073 (5th Cir.), this Court said:

> "With respect to the requirement of a hearing and the adequacy thereof, in Thaw v. Board of Public Instruction, 432 F.2d 98, 99 (5th Cir. 1970), this Court stated that a school board is required to provide notice and hearing before dismissing a public school-teacher or college professor in two types of cases. The first type is when a teacher has tenure or a reasonable expectation of reemployment. Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). The second type is when a teacher without tenure or expectancy of reemployment asserts that he has been dismissed for constitutionally impermissible reasons. Pred v. Board of Public Instruction, 415 F.2d 851, 856 (5th Cir. 1969). This case falls into the second category."

In Megill, the plaintiff first alleged that he was entitled to be rehired as a teacher by the Board of Regents of the

State of Florida unless he could be found after a due process hearing to have been denied a position for cause. He also alleged that the actual ground of his failure to be rehired was his expression of opinion and vocal criticism of the institution which would be a denial based upon his exercise of his First Amendment rights. This Court held that because Megill had no form of tenure or right to continued employment beyond the term of his contract he did not have the requisite "property" interest in being rehired upon which to base a claim to constitutional due process. Nevertheless, the Court concluded that since he "assert[ed] that he has been dismissed for constitutionally impermissible reasons" he was entitled to procedural due process.

Here, an allegation that the basis of the defendants' action was the impermissible basis of race may be equated with the assertion in Megill of "constitutionally impermissible reasons."

We conclude that it was just not possible for the trial court, here, to determine whether proper criteria were used by the defendants in denying the Drummonds the right of adoption. This follows from the fact that no amount of analysis or explana-

tion of the documents prepared and utilized by the defendants would support a finding of any basis on which they actually decided that the Drummonds were not suitable as adoptive parents. Several possible reasons were suggested by different staff workers at different times. It is clear that the Drummonds knew from the start that foster parents were not normally considered to be desirable as adoptive parents. However, there is no statement or fact finding or determination that this fact was the basis for the denial. Neither is there any statement to the effect that the Drummonds' age was a basis for the decision. All of this follows, of course, from the fact that no responsible official either made or recorded the actual reasons. The fact that the defendants might have based their action on some fact other than race, cannot be accepted as a substitute for a finding or determination, on a record that is adequate for review, that such cause or causes actually brought about the result.

We conclude that under the law of this Circuit as announced in Megill, the Drummonds are entitled to have a hearing with at least some of the elements of procedural due process before they can be bound by a bald

determination (which, in fact, was not even made by the defendants here) that no impermissible standards of race controlled their action.[4] Moreover, although it may not have been a basis for decision in Bolling v. Sharpe, supra, the Court's language in discussing the two provisions of the Fourteenth Amendment seems to be applicable here. This, we think, is a case in which the alleged "discrimination [is] so unjustifiable as to be violative of due process," 347 U.S. 497, 499, 74 S.Ct. 693, 694.

Our determination that the Drummonds have a liberty interest of which they cannot be deprived without a due process hearing is in accord with a judgment of a three-judge district court of the Southern District of New York in Organization of Foster Families for Equality and Reform v. Dumpson, D.C., 418 F.Supp. 277.[5]

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4. The nature of such hearing, while primarily a matter for the administrative officials to provide, will be discussed more fully infra.

5. As indicated, the Supreme Court to which a direct appeal, of course, lies from the three-judge court decision, entered an order noting probable jurisdiction on October 12, 1976. Smith v. Organization of Foster Families for Equality & Reform and Shapiro v. Organization of Foster Families for Equality & Reform (probably jurisdiction noted) __U.S.__, 97 S.Ct. 232, 50 L.Ed.2d 164.

There were other circumstances in the New York case which do not appear in the case before us. In its disposition of the case on appeal, therefore, the Supreme Court may not reach the precise questions with which we deal here. In the New York case, the three-judge court was dealing with state statutes and also with a provision that afforded very substantial elements of procedural due process as to some of the parties in that litigation. Moreover, the problem of racial discrimination was not involved. In view of the need for as prompt action as may be reasonably possible, we consider it not inappropriate to proceed to a judgment in this case without awaiting the action by the Supreme Court in Smith and Shapiro.

IV. TIMMY'S RIGHTS

Immediately upon the filing of the order of the district court, Mr. and Mrs. Drummond filed their notice of appeal and filed a motion for an injunction pending appeal, seeking to prohibit the defendants from removing Timmy from their care until the case is disposed of on the merits on appeal. This court denied the injunction, holding that it did not appear that the

Drummonds met the strict requirements for a stay pending appeal, that determination having been made apparently largely on the conclusion of the court that at that stage of the proceeding it did not appear that there was a likelihood of their prevailing on the merits on appeal. Nevertheless, the court ordered the case placed on the docket for an expedited hearing and concluded with the following order:

> "Therefore, it is further ordered that an attorney shall be appointed to represent the interests of the child Timmy before this Court. Cf. Organization of Foster Families for Equality & Reform v. Dumpson, 418 F.Supp. 277 (S.D.N.Y. 1976)."

Pursuant to this order of the court, Alan R. Turem, Esq. was appointed "to represent the interests of the child Timmy before this Court in this case" on July 2, 1976.

Pursuant to that appointment, counsel filed an exhaustive brief undertaking to show wherein Timmy had a critical interest in the outcome of the litigation and that such interest was one that might not be adequately vindicated by either the appellants, the Drummonds, or the defendants, the Fulton County Department of Family and

Children's Services and individual officials. Counsel also filed a motion with this Court for permission to intervene in the litigaion. The merits of this contention have already been recognized by this Court in its order of May 19 which stated: "We also recognize that the interests of the individual who will be most affected by the ultimate decision in this case may not be coextensive with those of either of the former [sic formal] parties."

Timmy's counsel argues that Timmy, as a child, is entitled to Fourteenth Amendment protection generally, despite his essential "ward" status created pursuant to the state's parens patriae power, citing In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). He has also alleged a specific protectable interest under the due process clause of the Fourteenth Amendment. By reference to several Georgia Supreme Court cases, i.e., Elrod v. Hall Co. Dept. of Family & Children's Services, 136 Ga.App. 251, 220 S.E.2d 726 (1975) and In re Levi, 131 Ga.App. 348, 206 S.E.2d 82 (1974), he confects a "right" which he chooses to denominate a "right to a stable environment." Moreover, the Department's brief seems to recognize the existence of such a

right in a child at least up to the time of the legal proceedings which terminate the natural parents' rights to the child. Appellee's brief states:

> "The Department recognizes the existence of children's rights ... and specifically recognizes that Timmy has due process rights involved in the juvenile system."

The apparent difference between the position of the two parties here is that the defendants take the position that due process is afforded such a child as Timmy by the entire "juvenile system" of the State of Georgia which provides that the termination of the parents' rights occurs only in court with full procedural protection and that adoption occurs only in the same manner, that is to say in a court proceeding where full procedural rights are afforded the child. On the other hand, Timmy's counsel contends that at any critical stage of the proceedings between termination and final adoption, procedural due process must exist if, in fact, at such stage Timmy's future life, security and stability are irrevocably changed. Such a stage, they contend, was reached when the defendants undertook to deny permanently and irrevocably the right

of the Drummond family, the only parents Timmy knew, the right to adopt the child.

It cannot be gainsaid in light of what has already been stated, that Timmy fully meets the requirements of Rule 24(a), F.R. C.P. which provides as follows:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

In discharging the duties for which he was appointed by this Court, counsel seeks to have this Court permit Timmy's intervention and further seeks to have the trial court's judgment vacated and the case remanded on the ground that the child's rights could not be irrevocably affected by the defendants without a hearing conducted in accordance with the mandates of due process. Thus, the relief sought by both appellants

and Timmy coincide on this appeal.[6]

We conclude that Timmy should be permitted to intervene and that this shall be accomplished by an order of the trial court on remand, which court will also determine the need of having a guardian ad litem appointed in addition to having counsel represent the child. The trial court shall also determine by order the minimum requirements for the holding of a due process hearing within the administrative agency which will give to all interested parties a full opportunity to be heard, to inquiry into the policies, customs and procedures that prevail with regard to a child of Timmy's characteristics and into the qualifications of the foster parents as claimants of the right to adopt Timmy. Optimistically, these parts of the trial court's order can be arrived at by agreement or upon submission of a plan or procedure by the parties.

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6. The appellants, in addition, seek a reversal of the trial court's determination, and seek a decision by this Court that race played an impermissible part in the action of the defendants. The absence of a hearing dealing with this issue within the administrative agency makes impossible a decision by us either in favor of the appellants or the appellees on this issue.

V. CONCLUSION

In sum, we conclude that both the foster parents having a close familial relationship during the first years of this child's life and the child himself have a protectable interest under the Fourteenth Amendment which cannot be denied them without due process of law. We also conclude that their contentions that they have been denied equal protection of the laws because their joint familial relationship had been broken by state action solely on account of race requires a due process hearing to determine the truth or falsity of this contention. We also conclude that Timmy has a right to intervene by proper order in the trial court.

The judgment of the trial court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion. The motion by Timmy's counsel for the issuance of this Court's writ of habeas corpus and the motion that this Court hold the original defendants in contempt of court for failure to make the child available to them are DENIED.

The motion for attorney's fees has not been fully briefed and it will be disposed of later.

The mandate of the Court will issue forthwith.

RONEY, Circuit Judge, dissents and will file his opinion later.

RONEY, Circuit Judge, dissenting:

I respectfully dissent. I regret that the press of court business prevented the preparation of this dissent in time for distribution with the majority opinion; and that there has not been even now time to fully develop the premises for this Federal consideration of a state matter so complex.

The majority opinion opens with a question that simply is not asked in this case.[1] The question accurately put is this: may a state agency, charged with the responsibility of placing for adoption a child in its legal custody, take into consideration the race of the child and the race of prospective adoptive parents without violating the Constitution of the United States?

We are not confronted with a statute that makes interracial adoptions illegal, Compos v. McKeithen, 341 F.Supp. 264 (E.D. La. 1972)(three-judge court); nor with a

1. The majority opinion states: this appeal presents the question whether the federal courts can give relief to white foster parents who contend that they have been unconstitutionally denied by Georgia state officials the right to adopt a mixed race child solely on account of race.

private adoption in which the state investigatory agency has withheld consent because of race, see Ga.Code Ann. § 74-403(4)(1973); nor with a state court decision that an adoption cannot take place because of ethnic origin disparity between a white child and a black stepfather, who was the natural mother's second husband, see In re Adoption of a Minor, 97 U.S.App.D.C. 99, 228 F.2d 446, 448 (1955); nor, for that matter, with the question of whether an agency with legal custody of a child can use race as an automatic, and therefore the sole, basis for denying the application of a prospective adoptive parents to adopt a particular child. The finding of fact by the district court that race was not the sole basis for denying the application of the Drummonds for this child is not clearly erroneous, and the appellants do not so contend.[2] In fact, the

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2. Paragraph 9 of the Complaint states:

9. Defendants' refusal to place said child with Plaintiffs for adoption, based solely on racial grounds, is an unconstitutional denial of equal protection of the laws and an unlawful violation of the civil rights of Plaintiffs.

District court's verbal order:

"THE COURT: All right, I'll rule for the defendants. This case comes to the Court on a complaint, the crux of which is that the defendant's refusal to place said child with plaintiffs for adoption, based solely on racial grounds, is an unconstitutional denial of equal protection of the laws and an unlawful violation of the civil rights of the plaintiffs.

district court viewed the [illegible] as prohibiting an automatic-type placement of black with black, white with white or mixed race with black. Because the record does not support the application by the agency of an automatic rule, no question as to automatic standards is before us for review.

The record does support the fact that race was taken into consideration in a rather substantial way in the agency decision that the child would be better placed in a home other than the plaintiffs'. The question is whether the agency, not acting under the imperative of any law or unyielding automatic rule, but rather in the exercise of its own discretionary concepts of successful child placement, may constitutionally

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Therefore, the issue before the Court is to determine whether the decision of the Department of Fulton County Department of Family and Children Services was one solely based upon the impermissible criteria of race, or whether the race, to the extent that it entered into the decision, was only that legitimate consideration thereof which is--which the Court holds necessarily as required in determining the proper placement of a child."

At oral argument before this Court, appellants' attorney conceded that the record would not support a finding that the agency decision was based solely on race.

take into consideration as an important factor the race of the child and prospective parents. By the force of its decision, the majority must conclude that such action by a state agency violates the equal protection clause of the United States Constitution. For without that concept upon which to base a § 1983 claim, the plaintiffs have no federal case.

On this narrow point of constitutional law I would affirm the decision of the district court. No interpretation of the Constitution by any case cited to this Court prevents a state child placement agency from looking to the best interests of a child in its custody, as judged by agency determined criteria, in deciding where that child should be placed for permanent adoption. If the agency decides that physical characteristics of prospective adoptive parents in relation to those of the child are important criteria for protecting the best interests of the child, the Constitution does not prevent it. To permit consideration of physical characteristics necessarily carries with it permission to consider racial characteristics. This record reflects nothing more than a large number of

agency and social workers with unquestioned credentials endeavoring to find a permanent family home for Timmy that would be best for him the rest of his life.

Consider first the due process claims of the Drummonds. The majority concedes that under Georgia law there is no property right of foster parents to adopt their foster child. See Drummond v. Fulton Co., 237 Ga. 449, 228 S.E.2d 839 (1976). The majority then proceeds to ascertain if there is any liberty interest at stake requiring due process protection. It finds such an interest under Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). But Loving involved an individual's liberty interest in choosing whomever he wishes to marry regardless of race. It did not deny an individual's liberty right to refuse to marry someone not of his choosing. Accordingly, if the Drummonds have a liberty right in choosing a prospective adopted child, regardless of race, so too, does Timmy have a liberty right in choosing the best suitable parents. There is little doubt, now, that a child in Georgia would have a constitutional right to be adopted by parents of any race that he choose. But if it is a true "liberty" interest, he has the right not to be adopted by parents of a

given race. And he has a right to exercise that right solely in terms of his own best interests. Because an infant is incapable of exercising that right for himself, however, under Georgia law either the parents who voluntarily give up a child for adoption or the agency given legal custody of a child must exercise that right for him.[3] Thus, the reliance on Loving to give the Drummonds a

3. Under Georgia law, once the parental rights of a child's biological parents have been terminated, substantial authority is provided to the agency which assumes the care of the child. Ga.Code Ann. §24A-3204 (1976) provides that: "If, upon entering an order terminating the parental rights of a parent, there is no parent having parental rights, the court shall commit the child to the custody of the Division of Children and Youth or a licensed child-placing agency, ... The custodian has authority to consent to the adoption of the child, has marriage, his enlistment in the armed forces of the United States and surgical and other medical treatment for the child." Supplementing these powers are the further rights of the custodian set out in Ga.Code Ann. §24A-2901 (1976): "A custodian to whom legal custody has been given by the court under this Code [Title 24A] has the right to physical custody of the child, the right to determine the nature of the care and treatment of the child, including ordinary medical care and the right and duty to provide the care, protection, training, and education, and the physical, mental and moral welfare of the child,...." Georgia is not alone in this delegation of full parental powers to an agency which has been awarded custody of a child. See e.g., Fla.Stat. Ann. § 63.052 (Supp. 1976); Miss.Code.Ann. § 93-15-9 (1972). This is consistent with the general rule that where the natural parents of a child are unfit, the state may assume custody of the child. 59 Am.Jur.2d, Parent and Child § 39 (1971), with custody being

due process liberty right in connection with adopting a child must also be extended to give the child, through his natural parents or the state as his legal custodian, a corresponding due process liberty right.

Moreover, to the extent that Loving is a due process case, it is a substantive due process case, in which a state statutory scheme barring interracial marriages was struck down as being inconsistent with the Fourteenth Amendment. The constitutional basis for the Court's holding was that the freedom of choice to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by invidious racial discriminations imposed by the state. The case was not a procedural due process decision. The Supreme Court did not suggest that by some amount of procedural due process, notice, hearings, impartial hearing officers, record and review, Loving could have been deprived of the right to marry the one who wanted to marry him. Loving

defined as "the sum of parental rights with respect to the rearing of a child including his care. It includes the right to the child's services and earnings and the right to direct his activities and make decisions regarding his care and control, education, health and religion." 59 Am.Jur.2d, Parent and Child § 25 (1971).

is not authority for declaring that foster parents have a due process right to a hearing before a child placed in their care can be removed from their home, or before their application for a particular child, in which the state law gives the foster parents no legal interest, can be refused.

To the extent that the contention is made that the Drummonds are entitled to minimal due process before their application for adoption of any child can be denied, in my view, such due process as was due was rendered. The record fully supports the fact that complete consideration was given to the Drummonds' application to adopt Timmy. The agency clearly had no per se rule against placing a black or mixed race child in a white home, as indicated by the fact that it had previously made such a placement and the additional fact that the record shows serious consideration of the Drummonds as adoptive parents. Their application was not dismissed out of hand, or treated arbitrarily. Extensive and long-term investigations were made of the conditions in the Drummonds' home to determine if this type of placement would work in this case. A total of eighteen persons were involved in providing input into what emerged as a group consensus. The

Drummonds were not without their partisans in the decisive meeting. The ultimate decision was not made in an informational vacuum. The social workers who made the decision about Timmy and the Drummonds were more intimately acquainted with them, their past history and any potential problems, than any hearing officer could ever be. I think that this form of rational decision making is all that is required. Due process does not mean the kind of adversarial hearing with which courts are so familiar. The factors that must be weighed in deciding if a mixed race child could have a successful life in a particular white home are so complex and ephemeral that adversarial procedures are inappropriate.

The case-worker system of social service established by the state for the processing of these very difficult personal and social decisions should not be destroyed under a constitutional edict. Limitations of time, money and human resources may well dictate the methodology of the state agency, but as long as all legal interests of the parties are reasonably protected, the state procedure is not subject to constitutional supervision.

The attorney appointed by this Court to represent Timmy on this appeal argues that

Timmy is entitled to a due process hearing upon any change in foster home care regardless of the Drummonds' interes . The suggestion that such a position is supported by In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), and McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971), is misplaced. In each of those cases and their progeny, the children involved had run afoul of the laws of the state, laws in which the state had an enforcement interest. The rights of the juvenile were in conflict with the state interest in enforcing its own laws. Such due process cases are inapplicable to a case such as this, where the state interest in finding the best home for Timmy coincides perfectly with his interest. Some adult must make the decision for him. Nothing here has shown that an adult court-appointed guardian ad litem and an attorney of his own could better protect that interest than the mechanism which has been established by the state. Certainly a difference, if one exists, does not support a declaration that one is constitutional and the other not. Whether the record made before the state agency suits the needs of a federal judiciary, which has

no general authority for review and no supervisory powers over the operation of the agency, should be irrelevant.

The other area in which the majority finds entitlement to a hearing is the equal protection clause. Relying on Megill v. Bd. Regents of the State of Florida, 541 F.2d 1073 (5th Cir. 1976), the majority finds a right to a hearing in that the decision against allowing the Drummonds to adopt Timmy was made for constitutionally impermissible reasons, to wit, racial matching of parent and child. The majority concludes that it is impossible to ascertain just what factors were used in reaching the decision but, because constitutionally impermissible ones might have been decisive, the Drummonds are therefore entitled to a hearing.

Reliance on Megill, however, necessitates ahderence to the fundamental proposition asserted by appellants that race cannot be used as a substantial factor in the agency's placement decision. The Drummonds would be entitled to a hearing under Megill only if the use of race as one of several factors is constitutionally impermissible. I do not think that it is. As one court has already noted, "we regard the difficulties inherent in interracial adoption as justifying

consideration of race as a relevant factor in adoption, ..." Compos v. McKeithen, 341 F.Supp. 264, 266 (E.D. La. 1972)(three-judge court).[4]

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4. The controversy in the social service world is well documented. In an effort to find permanent homes for all children, particularly the thousands of homeless black and mixed race children, many adoption agencies and social workers have encouraged transracial adoptions as a solution to this most urgent problem. Chastang, The Dilemma of Biracial Adoption, 17 Social Work 100 (May 1972); Jones, On Transracial Adoption of Black Children, 51 Child Welfare 156 (March 1972). Transracial adoptions began in the early 1950s and increased in volume during the 1960s. Grow & Shapiro, Black Children-White Parents 1 (1974). Despite their growing popularity, transracial adoptions have been very controversial and are regarded by some as only a second-best alternative, and by others as not a viable alternative at all, in light of today's social realities. See Klibanoff, Let's Talk About Adoption 119-121 (1973); Chastang, supra; Jones, supra. In the spring of 1972, at its first annual convention, the National Association of Black Social Workers expressed its "vehement opposition to the practice of placing black children with white families." Grow & Shapiro, supra, at 5. The Child Welfare League of America, although emphasizing that inracial placement is preferable since "in today's social climate, children placed in adoptive homes with similar racial characteristics can become more easily integrated into the average family group and community," CWLA Standards for Adoption Service 92 (revised 1973), undertook to study a sample of transracial adoptions and found "apparent success" in the large majority. See Grow & Shapiro, supra. The relative degree of success, however, depended on many variables, including among others the parents' attitude, the size of the family, the parents' occupations, the motivation for adoption, the child's intellectual level, the community's characteristics, which tend to

This case is an unusually difficult one because the legal problems it poses are fraught with emotional overtones. The Drummonds are admirable people. They grew to love Timmy and bestowed upon him the care and warmth so needed by young children. They exemplified the highest goals of foster home care. But foster home care and permanent adoptive homes serve different functions for children. The qualities for one may differ considerably from the qualities for another. After extensive investigation and deliberation, the agency charged with protecting Timmy's welfare ultimately concluded that the interests of Timmy would be best served by placing him permanently in another adoptive home. The question before us is not whether that decision was correct. Cf. Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Tragic as the agency's considered decision was for the Drummonds, I would hold that it did not deprive the Drummonds of any protectable Federal interest. I would affirm the judgment of the district court.

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indicate the important role the agency must play in weighing these factors when placing a black or mixed race child in a white home. See Grossman, A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings, 17 Buffalo L.Rev. 303 (1968).

[March 28, 1977]

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

532 F.2d 1001 (1976)

Robert George DRUMMOND and Mildred Pauline Drummond,
Plaintiffs-Appellants,

v.

FULTON COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, et al., etc.,
Defendants-Appellees.

No. 76-1888

United States Court of Appeals
Fifth Circuit
May 19, 1976.

* * *

Before COLEMAN, GOLDBERG and GEE, Circuit Judges.

PER CURIAM:

Plaintiff-appellants' motion for an injunction pending appeal which would prohibit the defendants from removing the child Timmy from plaintiffs' care is hereby DENIED. In connection with this order, we deem it appropriate to make a few observations.

In Beverly v. United States, 5 Cir. 1972, 468 F.2d 732, 741 n. 13, this Court stated that

> in order to be entitled to a stay pending appeal under either Rule 62, F.R.Civ.P. or Rule 8, F.R.A.P., a petitioner must show the likelihood of his prevailing on the merits on appeal, that he is likely to suffer irreparable injury from the denial of the stay, that the other parties will not be substantially harmed by the grant of stay, and that granting the stay will serve the public interest.

Critical to our denial of the motion before us is the fact that this test places the bur-

den of proof on the petitioners. Even if we assume that the Drummonds have shown that without a stay they will suffer irreparable injury, they have failed to show that the other three requirements of the standard are satisfied in this case. Under the particular facts before us, those other three requirements are closely interrelated. A stay here would serve the public interest and would not substantially harm the Drummonds only if they were likely to prevail on the "ultimate" merits -- that is, if they were likely to become the permanent adoptive parents of Timmy. If they were not likely so to prevail, then the child's best interest and the public interest would not be better served by a stay. This of course is not to say that their ultimate success would be impossible; indeed, the panel hearing the Drummonds' appeal will probably face a number of complex issues.[1] Our decision today goes only to the very narrow question whether the Drummonds have

1. Without purporting to list all or any of the issues that will be before the panel, we note that the questions could include the following: Is race a constitutionally permissible factor in the evaluation of prospective adoptive parents? If so, what weight can race constitutionally carry in relation to other factors? Did the Fulton County authorities operate under a presumption that mixed-race children should go to black families? Are further findings of fact in the district court necessary on that issue? Would such a
(Footnote continued to next page.)

met the strict requirements for a stay pending appeal. In our opinion, they have not, and therefore, we must deny the motion for a stay to prevent Timmy from being removed from the Drummond residence pending the hearing of the appeal.[2]

Recognizing that undue delay in the final disposition of this case will disserve all interested parties, we have instructed the clerk to expedite the appeal and set the case for oral argument at the earliest possible time. We also recognize that the interests of the individual who will be most affected by the ultimate decision in this case may not

(Footnote continued from preceeding page.)
presumption violate the Constitution? What is the effect of the proceedings now pending in the Georgia courts? How broad is the discretion of the local child-placing agency?

Even if the panel of this Court were to decide that any consideration of race was violative of the Constitution, it is possible that the case would simply be remanded to the Fulton County authorities for redetermination of the Drummonds' suitability without regard to race. From the record before us, we cannot predict the result of such a redetermination.

2. We assume that the question of finalizing adoption proceedings pending appeal is adequately disposed of by the state court's order of April 7, 1976, forbidding finalization. If that court's order should expire before the hearing on the merits in this Court, plaintiffs would of course be free to seek relief in this Court.

be co-extensive with those of either of the formal parties.

Therefore, IT IS FURTHER ORDERED that an attorney shall be appointed to represent the interests of the child Timmy before this Court. Cf. Organization of Foster Families for Equality and Reform v. Dumpson, 411 F.Supp. 1144 (S.D.N.Y. 1976).

408 F.Supp. 382 (1976)

Robert George DRUMMOND and Mildred Pauline Drummond, Plaintiffs,

v.

FULTON COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, et al, Defendants.

Civ. A. No. C76-76A

United States District Court
N.D. Georgia
Atlanta Division

Jan. 30, 1976.

* * *

ORDER

MOYE, District Judge.

The above-entitled action comes to the Court on a compliant, the crux of which is that the defendants' refusal to place said child for adoption with the plaintiffs, based solely on racial grounds, is an unconstitutional denial of equal protection of the laws and an unlawful violation of the civil rights of the plaintiffs. The action having been regularly set down and called for a hearing on plaintiffs' application for a temporary injunction, the Court ordered that the trial of the action on the merits be advanced and consolidated with the hearing on the application. The Court having heard testimony and received documents into

evidence in support of plaintiffs' allegations, and the defendants having made a motion to dismiss the complaint at the conclusion of the plaintiffs' case.

It is hereby ordered, that the defendants' motion to dismiss be granted and the injunction dissolved. I find further that the issue is to determine whether the decision of the Fulton County Department of Family and Children Services was one solely based upon impermissible criteria of race or whether the race, to the extent that it entered into the decision, was only that legitimate consideration thereof which the Court holds necessarily is required in determining the proper placement of a child.

It is obvious that race did enter into the decision of the Department. The Court has read from beginning to end each of the exhibits which have been submitted by the plaintiffs, some of which throw considerable light on the question, particularly plaintiffs' Exhibit No. 15, which as far as the Court can tell, although there is no date on it, affords a contemporaneous version of the actual decision that took place, and where it is obvious that consideration of race did take place. It appears to the Court therefrom that the consideration of race was properly directed to the best interest of the child and was not the automatic type of thing

or placement; that is, that all blacks go to black families, all whites go to white families, and all mixed children to to black families, which would be prohibited.

In fact, despite the difficulty of determining proper homes for mixed race children, as is shown by plaintiffs' Exhibit No. 19, the answers to plaintiffs' interrogatories which have been received in evidence shows that there have been some placements of mixed race children with white parents.

Apparently therefore, it is not an automatic type of placement which the Court holds to have been forbidden. Therefore, the Court feels that the plaintiffs have not made out a prima facie case under Title 42, §1983 of the Code of the United States, or the Fourteenth Amendment to the Constitution of the United States.

In dissolving the Temporary Restraining Order, refusing to issue the preliminary injunction, and dismissing the plaintiffs' case, it should be noted that this Court does not have plenary authority with respect to this matter to determine which is the best home for adoption; that is, to make a choice between the plaintiffs' home and the home of whomever has been selected by the Fulton County Department of Family and Chilren Services. If there has been some error in the

handling of this matter by the Fulton County Department of Family and Children Services, it would be subject to the Georgia Administrative Procedure Act, in which case the Georgia courts will have the authority to determine whether the procedures have been violated. So far as this Court is concerned, it has had before it the very narrow question of whether the issue of race impermissibly entered into the decision of the defendants so as to block the legitimate consideration of factors which ought to have been considered by them in their determination of whether to place the child for adoption with the plaintiffs.

The record, as submitted by the plaintiffs, does not show a prima facie case and the Court finds that it has no alternative but to dismiss the action and dissolve the injunction. Further, the Court finds that there is insufficient merit in plaintiffs' allegations to grant a stay pending appeal and therefore this Court will refuse to grant such a stay.

IN THE SUPREME COURT OF THE STATE OF GEORGIA

31316. DRUMMOND et al. v. FULTON COUNTY DEPARTMENT OF FAMILY & CHILDREN SERVICES, et al.

UNDERCOFLER, Presiding Justice.

Timmy is a two and a half year old boy, who has been the foster child of the plaintiffs, the Drummonds, since he was one month old. He was placed in their home by the Fulton County Department of Family & Children Services (FCDFCS) after it received temporary custody by court order because the natural mother was unfit. In September, 1975, the natural mother's rights were terminated, legal custody was placed in FCDFCS, and Timmy became eligible for adoption. After their application was denied by the agency, the Drummonds filed this suit to enjoin Timmy's removal from their home and to force the FCDFCS to allow them to adopt Timmy. After the Drummonds' evidence was presented at the hearing on the interlocutory injunction, the FCDFCS moved to dismiss the complaint, and the motion was granted. The Drummonds appeal. We affirm.

1. The Drummonds' complaint seeking injunctive relief to prevent Timmy's removal was dismissed by the trial court as a matter of law. Enumerations 3, 6, 7 and 8 raise the question whether foster

parents have any rights vis-a-vis their foster child, and thus standing to protest agency action on behalf of the child and to raise Fourteenth Amendment protections.

The Drummonds first argue that Code Ann. §74-402, which states that "[a]ny adult person may petition for leave to adopt," supports their claim of standing to contest the agency's action. Although the Drummonds may have standing to bring an adoption petition in the sense that they are legally eligible to apply to the agency, they have no standing to contest the legal custodian's absolute discretion whether to give the consent requisite to a successful petition for adoption. See Division 5 of this opinion, infra. The contention that any such rights are conferred by this Code section is without merit.[1] We find Duncan v. Harden, 234 Ga. 204 (214 SE2d 890)(1975) inapposite as it deals with the revocation of consent by the natural parents. The mere statement of fact that the adoptive parents already chosen by the agency did not intervene in no way implies that all potential adoptive parents have any rights.

1. Nor do we find any merit to the argument that Code Ann. §24A-2001, providing for appointment of counsel where children not represented by a custodian are brought before a juvenile court in delinquency, unruliness or deprivation proceedings, implies that foster parents may have certain rights.

The Drummonds next urge that any application of the "best interests of the child" rule necessarily implies some de facto rights arising from the psychological dependency of a parent-child relationship which has been sustained over a period of time. Plaintiffs' expert witnesses testified to the trauma of separating a young child such as Timmy from the only parents he has ever known at an age when the separation could not adequately be understood or explained to him. See Alternatives to Parental Right in Child Custody Disputes Involving Third Parties, 73 Yale L.J. 15 (1963).

The best interest of the child test has been adopted in many jurisdictions. E.g., In re B.G., 11 Cal.3d 679 (523 P2d 244)(1974); In re Confessora B., 348 N.Y.S. 2d 21(1973); Halstead v. Halstead, 144 NW2d 861 (Iowa, 1966)(and cits.); Cummins v. Bird, 19 SW2d 959 (Ky. 1929). This rule contemplates a presumption that the best interests of the child lie with the natural parent, but that this presumption may be rebutted by clear and convincing evidence to the contrary. In re Confessora B., supra.

The Georgia law, however, has not followed this pattern. The best interest of the child test is used only between parents who both have equal right to the child. Code Ann. §74-107; Knox v. Knox, 226 Ga. 619 (176 SE2d 712)(1970). Where the dispute is between a natural parent and a third party, on the other hand, the court must award the custody of the child to the parent unless he has lost his parental prerogatives under Code Ann. §74-108 or is unfit. Edwards v. Cason, 237 Ga. 116; White v. Bryan, 236 Ga. 349 (223 SE2d 710)(1976); Knox v. Knox, supra; Perkins v. Courson, 219 Ga. 611 (135 SE2d 388)(1964). See generally Stubbs, A Summary of the Georgia Law of Children, Ch. 7 (1969).

The Drummonds (and amici, The Concerned Foster Parents of Metro Atlanta and Foster Parents in Action) misconstrue the Georgia law in assuming that the best interests of the child rule applies to foster parents. Without this test and its focus on the child, there is no basis for recognizing any right in the "psychological parents." Since the focus in determining whether a third party is entitled to custody is on the natural parents and whether or not they have forfeited their

rights or are unfit (Code Ann. §74-107; Perkins v. Courson, supra), any relationship between the child and his foster parents is primarily irrelevant. Stuckey v. Jones, 212 Ga. 495 (93 SE2d 719)(1956); Watkins v. Terrell, 196 Ga. 651 (27 SE2d 329)(1943).

In Carson v. Marette, 217 Ga. 614 (124 SE2d 74)(1962), in a similar situation where a foster parent sought to adopt a child whose legal custody had been placed in the juvenile court by written consent of the mother, the court placed the child in the plaintiff's foster home intending to allow the plaintiff to adopt it. When a neighbor complained that the plaintiff was treating the child cruelly, the juvenile court took the child back and placed it with the state agency. Plaintiff's habeas corpus petition was dismissed because she had no claim to the child. "The only custody that petitioner, Mrs. Carson, even had of the child was that of custodial care under the order of the court which could be revoked at any time." 217 Ga. at 615. We see no reason why the result should not be the same where the court has placed the legal custody in a state agency which also pays foster parents for the child's custodial care.

We thus find no merit in the Drummonds' claim of right by virtue of their status as Timmy's foster parents. The trial court did not err, as alleged in Enumeration 3, in denying any legal rights to foster parents who have cared for a child for more than two years and are his psychological parents.

Enumeration of error 7 urging that the trial court erred in holding that the Drummonds were not denied due process or equal protection under the Fourteenth Amendment must also fall under our holding that foster parents have no right to adopt a foster child and thus no right to contest the agency's withholding of consent. The Fourteenth Amendment protects life, liberty and property interests from undue interference by the state.[2] Board of Regents v. Roth, 408 U.S. 564 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim of

2. The Fourteenth Amendment in pertinent part provides: "... nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

entitlement to it." 408 U.S. at 577. The Drummonds allege several theories under which they claim entitlement to Fourteenth Amendment protections. We, however. find no merit to their contentions, and thus no standing to demand due process or equal protection of the laws.

The Drummonds' first argument that the right to adopt a child under Code Ann. § 74-402,[3] is a "protectable interest" under the Fourteenth Amendment has already been considered and rejected above. They in fact were given the right to apply, they were interviewed and the application denied. As we have already noted, the agency's discretion as to which adoptive family will be chosen is absolute and the Drummonds have no rights beyond being considered. Furthermore, the United States Supreme Court has made clear that property interests are defined by state law. Board of Regents v. Roth, supra. The law of Georgia very clearly provides no rights in foster parents to adopt.

3. The only statutory requirements for adoption are that the person be at least twenty-five years old or married and living with his spouse, at least ten years older than the child, a resident of the state, and financially able and morally fit to have the child. Code Ann §74-402. Of course, Code Ann. §74-403 provides the conditions under which a child becomes available for adoption.

For the same reason, the Drummonds can not base their due process claim on a "right of family privacy." Since they have no right to keep Timmy, they can have no expectation of family privacy. Stanley v. Illinois, 405 U.S. 645 (1972) and other cases cited by the Drummonds are inapposite as the court in those cases was dealing with the rights of the biological parents.

The Drummonds next claim that the refusal by the adoption agency to allow them to adopt Timmy was based on erroneous information which they had no opportunity to contradict or correct and entitles them to due process. However, where there is no property interest to be protected, the Fourteenth Amendment does not "guarantee against incorrect or ill-advised [agency] decisions." Bishop v. Wood, __ U.S. __ (96 SC 2074, 48 LE2d 684, 693)(1976).

Nor do we find merit in the Drummonds' claim that they had a "justified expectation" or "implied contract" to adopt Timmy. See Board of Regents v. Roth, supra; Perry v. Sindermann, 408 U.S. 593 (1972); Sims v. Fox, 505 F.2d 857 (5th Cir. 1974).

The Drummonds' allegation that the agency's refusal to allow them to adopt Timmy constitutes "a governmental attack on one's 'good name, reputation, honor, and community standing'" (Sims v. Fox, supra, p. 862; Wisconsin v. Constantineau, 400 U.S. 433 (1971)), and thus imposes due process obligations on the agency, is also without merit. Since the agency did not disclose this decision publicly, but merely communicated its decision orally at a meeting with the Drummonds, it cannot form the basis of a claim that the Drummonds' reputation in the community was impaired. Any other publicity "made in the course of a judicial proceeding which did not commence until after petitioner[s] had suffered the injury for which [they seek] redress... surely cannot provide retroactive support for [their] claim." Bishop v. Wood, supra, p. 692; Sims v. Fox, supra.

We thus find no basis for due process protections in favor of the Drummonds, and the equal protection arguments must also fail for the same reasons.

We decline to rule on the FCDFCS's assertions that res judicata and collateral estoppel bar relitigation of these constitutional issues. These claims arise from

the fact that the Drummonds first brought a similar action against the FCDFCS in federal district court under 28 USC §1983. When relief was denied there, the Drummonds instituted this suit in the Fulton County Superior Court. The FCDFCS has properly pleaded these affirmative defenses (Code Ann. § 81A-108(c)); however, they must be properly proved by placing the entire certified record of the previous case in evidence. Carr v. Car-Perk Services, Inc., 222 Ga. 793 (152 SE2d 692)(1966); Smith v. Bank of Acworth, 220 Ga. 626 (140 SE2d 889) (1965); Glaze v. Bogle, 105 Ga. 295 (31 SE 169)(1898). Since the Drummonds' case was dismissed before the FCDFCS had an opportunity to present its case, the certified record was not put in evidence, is not part of this record, was not considered by the trial court, and will not be considered here.

In conclusion, we hold that the Drummonds have no rights under the Fourteenth Amendment and thus no standing to contest the agency's action in refusing to consent to their adoption of Timmy. Their request for an injunction was correctly dismissed.

2. We also find no merit in Enumeration 8 claiming that the trial court erred in not holding that Timmy's constitutional

rights were infringed since Timmy has no right under the adoption statutes to choose his adoptive parents or consent to his adoption until the age of fourteen. Code Ann. § 74-403. Furthermore, he was not a party to this lawsuit.

3. In enumeration of error 14, the Drummonds claim a denial of due process by the FCDFCS because of its refusal to afford them a hearing under the Administrative Procedure Act, Code Ann. Ch. 3A-1. Code Ann. § 3A-114 provides that "In addition to any other requirements imposed by common law, Constitution, statutes or regulations: (1) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice served personally or by mail." (Emphasis supplied.) The definition of "contested case" is contained in Code Ann. § 3A-102(b): "'Contested case' means a proceeding ... in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." (Emphasis supplied.)

We have already reviewed in essence in Division 1, supra, the common law, Constitution, and statutes in order to determine if any rights accrued to the Drummonds by

virtue of their status as Timmy's foster parents, and have found none. It is also clear from the record that the FCDFCS rules and regulations also do not afford any right in the foster parents to adopt a foster child in their care. The normal policy, which was not carried out in this case, is to ask potential foster parents to sign a statement acknowledging that the child will not be available for adoption by them. Foster parents are, however, eligible to apply to adopt foster children, in exceptional cases.[4] County Letter No. 323, State Department of Family and Children Services (Oct. 15, 1971). It thus appears that the agency, rather than recognizing any priority in foster parents as potential adoptive homes, discourages such adoptions.

4. "Foster boarding applicants are oriented from the beginning of the home study in a different way from adoptive applicants. The foster care plan is geared toward the temporary instead of the permanent. The home is not selected for the child with the idea that it will be a permanent home. Indeed, for most of the children in foster care, adoption will not be the ultimate plan. The foster parent may be older than adoptive parents would ideally be or may have health problems which do not rule them out as temporary foster parents but would cause adoption to seem questionable. Foster parents are asked to sign a statement when they accept a child to the effect that this child is not available for adoption by them.
(Footnote continued to next page.)

Once, however, the foster parents and others have made known their wish to adopt a child, the agency is free to choose any or none of the applicants, according to its own policies. There is no opportunity for a hearing. Although each potential adoptive couple is interviewed, this functions as a fact finding mechanism rather than as an adversary proceeding or "hearing" in which evidence is presented. We, therefore, reiterate that the decision to choose adoptive parents for children in the custody of the FCDFCS is entirely discretionary in nature, the same as it would be for the natural parents in whose place the agency stands. Since there is thus no "contested case" within the meaning of the APA, the trial court did not err in failing to rule that such a procedure was necessary.

(Footnoted continued from preceeding page.)
"For the above and other reasons, the development of a foster home into an adoptive home for a foster child in that home must definitely be considered an exception. However, this plan should not be overlooked as a possibility for certain children nor should it be considered an inferior plan. The foster home as an adoptive home is generally considered a resource for older children who have formed meaningful relationships with the foster family or for children with health problems or handicaps which the foster parents understand, accept and handle satisfactorily." County Letter No. 323, State DFCS (Oct. 15, 1971).

4. The Drummonds' enumeration of error four raises the question whether the trial court erred in dismissing their petition for adoption as fatally defective on the grounds that the FCDFCS had not consented to the adoption. They allege that the consent was unreasonably withheld, thus unnecessary, and their petition should not have been dimissed.

Although the FCDFCS had only temporary custody of Timmy when he was removed from his natural mother and placed with the Drummonds at one month old, the Department obtained his legal custody on September 25, 1975, when the natural mother's parental rights were terminated.[5] Only then was was Timmy eligible for adoption. Code Ann. § 74-403 requires the consent of the agency before a child placed in its legal custody may be adopted.[6] Code Ann. § 24A-3204(a),

5. "It is further ordered that legal custody of the said [Timmy] be placed with the Georgia Department of Human Resources, Division of Family & Children Services, and the said agency is granted the right to proceed with the adoption with the adoption of said child..."Order, Fulton County Juvenile Court, September 25, 1975.

6. §74-403. Consent of living parents or guardian....

(1) Except as otherwise specified in the following subsections, no adoption shall be permitted except with the written consent of the living parents of a child ...

(Footnote continued to next page.)

which provides for the placing of children with an agency upon termination of parental rights, also mandates that consent of the agency is necessary for adoption.[7]

The FDCFCS as legal custodiam of Timmy stands in loco parentis and has all the legal rights of a natural parent, including the benefit of the prima facie right to

(Footnote continued from preceeding page.)

(2) Exemption where child abandoned or parental custody terminated...

(4) Guardian.--If the child has a guardian of its person, the consent of such guardian shall be required, or if the child has been surrendered or committed by court order to a licensed child-placing agency, the consent of such agency shall be required.

7. §24A-3204. Commitment to agency.

(a) If, upon entering an order terminating the parental rights of a parent, there is no parent having parental rights, the court shall commit the child to the custody of the Division of Children and Youth or a licensed child-placing agency, willing to accept custody for the purpose of placing the child for adoption, or in the absence thereof in a foster home or take other suitable measures for the care and welfare of the child. The custodian has authority to consent to the adoption of the child, his marriage, his enlistment in the armed forces of the United States and surgical and other medical treatment for the child.

custody. See Porter v. Watkins, 217 Ga. 73 (121 SE2d 120)(1961); Parker v. Thomas County Dept. of Public Welfare, 214 Ga. 701 (107 SE2d 178)(1959). As is clear from Code Ann. §74-403, the agency also has the right to choose the adoptive parents of its wards by giving or refusing its consent to adopt.[8] Since the Drummonds did not have, nor claim to have this consent, the adoption petition was fatally defective, and subject to dismissal.

The Drummonds claim, however, that the consent of the FCDFCS was withheld unreasonably, was "arbitrary" and was "clearly an 'unwarranted exercise of discretion'." Since we have already held that the Drummonds have no right or standing to challenge the agency's action, the trial court properly dismissed this claim.

5. Enumerations of error 1, 2, 5, 9 and 12 need not be considered as they relate to procedural or evidentiary aspects of the case which are irrelevant since we here affirm the dismissal of the case as a matter of law for failure to state a claim for relief. We also hold that the trial

8. The Drummonds' reading of the statute whereby the agency's consent would not be required clearly misconstrues its langauge. See n. 7, supra.

court did not err in denying the Drummonds' motions for supersedeas, for new trial, or for reconsideration.

Both parties' motions to strike are denied.

Judgment affirmed. All the Justices concur, except Hill, J., who concurs specially, and Jordan, J., who dissents.

Argued July 13, 1976 -- Decided September 7, 1976

* * *

HILL, Justice, concurring specially.

Although I concur in the judgment of the court, I am unable to agree that because plaintiffs have not been denied life, liberty or property, they lack standing to urge equal protection arguments. The Fourteenth Amendment provides in pertinent part as follows: "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Standing to assert a denial of equal protection does not require a deprivation of life, liberty or property, but requires only the denial to a person by the state of the equal protection of the law, which denial affects the person asserting the

claim personally and differently from others similarly situated. In Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (92 SC 1965, 32 LE2d 627)(1972), a guest was refused service in the dining room and bar of a private club licensed by the state to sell liquor. Although the state's licensing was found not to be sufficient state action to invoke the Fourteenth Amendment, the court found that the guest had standing to litigate the equal protection claim. The court did not predicate standing to make the equal protection argument on a deprivation of life, liberty or property.

The plaintiffs contend that the state considered race in its decision not to permit plaintiffs' adoption of Timmy. The Fulton County Department of Family & Children Services presented evidence that other factors such as age, health and psychology were considered. However, this issue had been adjudicated between these same parties in the United States District Court, where it was found that consideration of race, to the extent it contributed to the decision, was only such legitimate consideration as was necessarily required in determining the proper placement of Timmy, and was not a part of an automatic placement policy based solely on race. The plaintiffs' complaint

in federal court was dismissed. Drummond v. Fulton County Department of Family & Children Services, 408 F.Supp. 382 (N.D. Ga., Jan. 30, 1976).

The court below had before it a certified copy of the district court's decision. The decision itself, even without the record, is sufficient to show the issue decided. See Pye v. Department of Transportation of State of Ga., 513 F.2d 290 (5th Cir. 1975). Cf. Ferguson v. Caldwell, 233 Ga. 887 (213 SE2d 855)(1975). Although the district court did not decide the state law questions, it did decide this Fourteenth Amendment issue. The district court had jurisdiction to decide that issue. Because the judgment of that court has not been reversed or set aside, that judgment is conclusive as between the parties here. Code Ann. § 110-501. Therefore, the court below committed no error in dismissing plaintiff's claim of denial of equal protection of the laws.

JORDAN, Justice, dissenting.

I do not agree with the holding in the majority opinion that the "relationship between the child and his foster parents is primarily irrelevant" and the conclusion that "we thus find no merit in the Drummonds'

claim of right by virtue of their status as Timmy's foster parents."

The facts in Carson v. Marette, 217 Ga. 614 (124 SE2d 74)(1962), cited in the majority opinion, which denied the claim of the foster parent, are vastly different from the facts in this case. In Carson the custody of the foster parent had been revoked by the juvenile court based on a complaint filed in that court alleging abuse and mistreatment of the child by the foster parent. Certainly this was sufficient to eliminate any legal claim or right the foster parent might have had. In the case under consideration the facts show love and care for the child and no court has ever revoked the custodial care given to the foster parents at the time the child was placed in their home.

It is my position that when a state agency having only legal custodial status places a child in a foster home, tacit approval is given that such foster parents are eligible to be adoptive parents. Once this relationship is shown to exist the burden should be upon the agency to show that conditions have changed adversely affecting the welfare of the child, such as was done in Carson, supra. Unless such

changed conditions are shown to exist, the agency no longer has the absolute and arbitrary discretion to refuse such application to adopt.

Here the record shows that the FCDFCS had approved the Drummonds as fit and proper foster parents for the care and protection of this child. This love, care and protection lasted some 2-1/2 years without complaint by the agency. During this period of time the foster parents became the psychological parents of the child, the only parents he had ever known. Upon their application to adopt, permission by the agency should have been given in the absence of a showing that they were no longer fit or eligible to become the adoptive parents.

This is not a dispute between the natural parent(s) of a child and some third party, as was the situation in several cases cited by the majority. This dispute is between foster parents who in time have become psychological parents and a state agency whose only interest should be that the "best interest of the child" test has been met. The initial determination of this test was made by the agency when it placed custodial care of the child in the Drummonds at the age of one month. This "best interest of the child" determination is presumed to

continue until the contrary appears. This record is devoid of facts to show such a change. The Drummonds' application to adopt was simply "denied."

Georgia should follow the lead of several states which have recognized that legal rights can attach to foster parents under certain conditions. See In re Confessora B., 348 N.Y.S.2d 21 (1973). Under the facts of this case the foster parents had clearly established an interest in the child sufficient to entitle them to a judicial determination of their right to adopt.

In my opinion the trial court erred in dismissing the complaint for failure to state a claim.

I respectfully dissent.

AMENDMENT XIV

(Ratified July 9, 1869)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

EXPLANATORY NOTE

The following three sections of the Georgia Code, §74-409, 74-410 and 74-411 were in effect until January 1, 1978. The next two sections set out, new numbers §74-409 and 74-410, are part of an extensive statutory revision of the adoption procedures of Georgia and became effective January 1, 1978.

[Repealed.]

§74-409 Request for investigation.

It shall be the duty of the clerk of the court to which the petition for adoption is addressed to forward a conformed copy of the petition for adoption, and the court's order thereon, to the Department of Human Resources together with a request that a complete report and investigation be made. This the said clerk shall do within 15 days after the filing of the petition for adoption.

§74-410 Investigation by Department of Human Resources or other agency.

Prior to the date set by the court for a hearing on the petition for adoption, it shall be the duty of the Department of Human Resources through its own agents, one of its

licensed child-placing agencies or through any other agency appointed by the said Department of Human Resources, to verify the allegations in said petition for adoption and to make a complete and thorough investigation of the entire matter, and to report its findings and recommendations in writing to the court where the petition for adoption was filed. If for any reason the Department of Human Resources shall find itself unable to make or arrange for the proper investigation and report, it shall be the duty of the director of the department to notify the court immediately, or [at] least within 20 days after receipt of the request for investigation service, that it is unable to make such report and investigation so that the court may take such other steps as in its discretion are necessary to have the entire matter investigated.

§75-411 Report by investigating agency.

The report and findings of the investigating agency shall, among other things, include the following:

(1) Why the natural parent or parents, if living, desire to be relieved of the care, support and guardianship of the child.

(2) Whether or not the parent, parents or guardian of the child have relinquished control over the child.

(3) Whether the proposed foster parent or parents is or are financially able and morally fit to have the custody of the child.

(4) The physical and mental condition of the child to be adopted insofar as this can be determined by the aid of competent medical authority.

(5) Whether or not the adoption is for the best interests of the child.

(6) Suitability of the child to the home, including suitability of racial and religious affiliations.

(7) Any other information that might be disclosed by the investigation that would be of any value or interest to the court in passing upon the case.

If the report of the Department of Human Resources or its duly authorized agents, as provided herein, disapprove of the adoption of the child, motion may be made by said department or by any agent by it authorized, to the court to dismiss the petition, and the court is authorized so to do.

[In effect.]

§74-409 Investigation by Department of Human Resources or other agency.

(a) Prior to the date set by the court for a hearing on the petition for adoption, it shall be the duty of the Department of

Human Resources through its own agents, one of its licensed child-placing agencies or through any other agency appointed by the Department of Human Resources, to verify the allegations in the petition for adoption and to make a complete and thorough investigation of the entire matter, and to report its findings and recommendations in writing to the court where the petition for adoption was filed. If for any reason the Department of Human Resources shall find itself unable to make or arrange for the proper investigation and report, it shall be the duty of the commissioner of the department to notify the court immediately, or at least within 20 days after receipt of the request for investigation service, that it is unable to make such report and investigation so that the court may take such other steps as in its discretion are necessary to have the entire matter investigated.

(b) If the petition has been filed pursuant to section 74-403(a)(3) or (4), the Department of Human Resources is authorized but not required to make an investigation and shall do so whenever requested by the court, in whatever form the court specifies.

§74-410 Report and recommendation

(a) The report and findings of the investigating agency shall, among other things, include the following:

(1) Verification of allegations contained in the petition.

(2) Circumstances under which the child came to be placed for adoption.

(3) Whether the proposed adoptive parent(s) is financially (including adoption supplement if approved by the Department of Human Resources), physically and mentally able to have the permanent custody of the child.

(4) The physical and mental condition of the child to be adopted insofar as this can be determined by the aid of competent medical authority.

(5) Whether or not the adoption is for the best interests of the child, including general care.

(6) Suitability of the home to the child.

(7) Whether the identity and location of a putative father is known, or ascertainable and whether the requirements of section 74-406 were complied with, if applicable.

(8) Any other information that might be disclosed by the investigation that would be of any value or interest to the court in deciding the case.

(b) If the report of the Department of Human Resources or the licensed child-placing agency as provided herein, disapproves of the adoption of the child, motion may be made by said department or by the licensed child-placing agency to the court to dismiss the petition, and the court after hearing is authorized to do so. If the court denies the motion to dismiss, the court shall appoint a guardian ad litem who may appeal such ruling to the Court of Appeals or Supreme Court, as in other cases, as now or hereafter provided by law.

(c) If at any time it appears to the court that the interests of the child may conflict with those of the petitioner(s), the court may, in its discretion, appoint a guardian ad litem to represent the child and the cost thereof shall be a charge upon the funds of the county.

(d) If the petition is denied, the court shall remand the child to the custody of the Department of Human Resources or licensed child-placing agency if the adoption

petition was filed pursuant to subsection (1) or (2) of section 74-403(a). If the adoption petition was filed pursuant to subsection (3) or (4) of section 74-403(a), the child shall remain in the custody of petitioner(s) if he is fit to have custody or the court may place the child with the Department of Human Resources for the purpose of determining whether or not a petition should be initiated under the Juvenile Court Code of Georgia [Title 24A].

§53-312 "White person" defined

The term "white person" shall include only persons of the white or Caucasian race, who have no ascertainable trace of either Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins. No person, any one of whose ancestors has been duly registered with the State Bureau of Vital Statistics as a colored person or person of color, shall be deemed to be a white person.

(Acts 1927, pp. 272, 277.)

§79-103 (2177) Persons of color, who are All Negroes, Mulattoes, mestizos, and their descendants, having any ascertainable trace of either Negro or African, West Indian, or Asiatic Indian blood in their veins, and all descendants of any person having either Negro or African, West Indian, or Asiatic Indian blood in his or her veins, shall be known in this State as persons of color.

(Acts 1865-6, p. 239; 1927, p. 272.)